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Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

BRIEF OF APPELLANTS

(See inside cover for Counsel)

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GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

BRIEF OF APPELLANTS

Appellants Exxon Corporation ("Exxon"), Phillips Petroleum Company ("Phillips"), Shell Oil Company ("Shell") and Gulf Oil Corporation ("Gulf"), appeal from the judgment of the Court of Appeals of Maryland, upholding the validity of Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland, 1975. The judgment of the Maryland Court of Appeals was a consolidated ruling on the appeals of Exxon, Phillips, Shell, Gulf, Continental Oil Company ("Continen-

tal"), and its subsidiary Kayo Oil Company ("Kayo"), Ashland Oil Inc. ("Ashland"), and Commonwealth Oil Refining Company, Inc. ("Commonwealth") and its subsidiary Petroleum Marketing Corporation ("PMC"). Separate appeals and jurisdictional statements were filed by Exxon and Phillips (77-10); Shell (77-11); Continental and Kayo (77-12); Gulf (77-47); and Ashland, Commonwealth and PMC (77-64). Probable jurisdiction was noted on October 3, 1977, and the separate appeals were consolidated. A separate brief is being filed by Continental and Kayo in 77-12, and by Ashland, Commonwealth and PMC in 77-64.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland contains the judgment of that court which reverses the judgments of the Circuit Court for Anne Arundel County. The opinion is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102. The supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is reported at 279 Md. 456 (advance reports) and unofficially at 372 A.2d 237. The Circuit Court for Anne Arundel County filed two opinions, neither of which has been officially reported. Copies of all four opinions are contained in the Joint Appendix to Jurisdictional Statements, as appendices A (1a-44a), B (45a-48a), C (49a-51a) and D (53a-134a), respectively.[1]

JURISDICTION

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) (1970). Probable jurisdiction of the Court over these appeals was noted on October 3, 1977.

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[1] References herein to the Joint Appendix to Jurisdictional Statements are cited, *e.g.* (J.A. 45a); references to the Appendix filed herewith are cited, *e.g.* (A. 45).

STATUTES INVOLVED

Chapter 854, Laws of Maryland 1974, was amended by Chapter 608, Laws of Maryland 1975, and codified in the Maryland Annotated Code (1957), Art. 56, § 157E (Vol. 5B, pp. 53, Supp. 1977). These chapters ("the Act" or "the Maryland Act") added the following provisions to the Motor Fuel Inspection Law:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(The italicized provisions are those added by Chapter 608 of the Laws of 1975).

The pertinent provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1970), (sometimes hereinafter referred to as Section 2 of the Robinson-Patman Act), are as follows:

> § 2(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .
>
> (b). Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Other pertinent provisions of Maryland law will be found in Appendix F to the Joint Appendix to Jurisdictional Statements (J.A. 155a-64a).

QUESTIONS PRESENTED

1. Whether Paragraphs (B) and (C) of the Maryland Act, which flatly prohibit the operation of retail service stations within the State of Maryland by producers or refiners of petroleum products, constitute an unlawful discrimination against or an undue burden on interstate

commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Paragraph (D) of the Maryland Act, which requires statewide uniform voluntary allowances, is in conflict with the Robinson-Patman Act and thus void under the Supremacy Clause of the United States Constitution where compliance with both Paragraph (D) and the federal act is impossible for a supplier of petroleum products in Maryland and where Paragraph (D) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Robinson-Patman Act.

3. Whether Paragraph (D) of the Maryland Act constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. The Proceedings Below.

The federal questions presented by these appeals were first raised in appellants' bills of complaint filed in the Circuit Court for Anne Arundel County, Maryland. Defendants in all cases were state officials charged with enforcement of the Act.[2] In their complaints, Exxon, Shell, Gulf and Phillips challenged the constitutionality of Paragraphs (B) and (C) of the Act as constituting, *inter alia*, a discrimination against and an undue burden

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[2] Appellants Exxon, Gulf, and Phillips have raised as questions presented for appeal, the first and second questions; appellant Shell has raised only the second question. Subsequent to the time Shell filed its bill of complaint, its one company-operated station in Maryland became dealer operated, and consequently Shell has not raised in this appeal the first question presented. Nevertheless, Shell adheres to its position that the Maryland Act's prohibition on the operation of retail service stations by producers and refineries of petroleum products is unconstitutional. The third question is raised by Gulf.

on interstate commerce. They also challenged the "voluntary allowance" provisions of Paragraph (D) as being in conflict with the Robinson-Patman Act.[3] (A. 16, 22-23, 65, 72-73, 74, 91, 100-01, 118, 120, 124).

On May 29, and June 19, 1975, Shell, Exxon and Gulf filed motions for partial summary judgment seeking, *inter alia*, a declaration that by requiring a supplier "to extend all voluntary allowances uniformly to all retail service station dealers supplied," rather than permitting a supplier to limit such allowances to individual competitive situations, Paragraph (D) was in conflict with the Robinson-Patman Act. (A. 153-55, 156-57, 161-62). In a Memorandum opinion dated October 14, 1975, the trial court granted plaintiffs' motions, holding Paragraph (D) in irreconcilable conflict with the Robinson-Patman Act. (J.A. 49a-51a). The court stated:

> Literal enforcement of paragraph D in matters of price allowances would place the plaintiffs in jeopardy of violation of the Robinson-Patman Act passed by the Congress of the United States in 1936 in an attempt to foster fair competition in interstate commerce.
>
> * * * *
>
> Moreover, paragraph D would have the effect of depriving the plaintiffs in Maryland of the absolute defense afforded them by subsection 2(b) of 15 US Code §§ 13-13B, 21a (1952) when plaintiffs are alleged to have discriminated in price between different purchasers of commodities of like grade and quality.
>
> * * * *
>
> This court finds that the risk of conflict in attempted compliance by the plaintiffs with paragraph D is all apparent, and that this paragraph would, of necessity, foster the lack of lawful competition within the State to the detriment of the consumer. It therefore finds that in obstructing the accomplishment and execution of the full purposes and objectives of an Act of Congress of the United States paragraph D is invalid under the preemption doctrine. *Hines* v. *Davidowitz*, 312 U.S. 52. (J.A. 50a-51a).

[3] Gulf also challenged Paragraph (D) on the additional ground that it constituted an undue burden on interstate commerce.

The case thereafter went to trial on the other issues. On January 27, 1976, the Circuit Court entered judgment for the plaintiffs (J.A. 134a), holding Paragraphs (B) and (C) to be unconstitutional on a number of grounds, although rejecting plaintiffs' contention that those provisions unduly burdened interstate commerce (J.A. 123a). The court reaffirmed its conclusion that Paragraph (D) was invalid in the light of the Robinson-Patman Act. Although the contention that Paragraph (D) violates the Commerce Clause was raised in appellants' bills of complaint, the trial court did not decide this issue since it was not required to do so in view of its ruling that Paragraph (D) conflicted with the Robinson-Patman Act. Pursuant to Maryland procedure, the Maryland Court of Appeals also did not decide this issue.[4]

On defendants' appeal to the Court of Appeals of Maryland, plaintiffs below renewed the constitutional arguments presented to the trial court. The Court of Appeals reversed the judgment of the Circuit Court, holding that all provisions of the Act were constitutional. In particular, the court rejected plaintiffs' contention that Paragraphs (B) and (C) violated the Commerce Clause and that Paragraph (D) was in conflict with the Robinson-Patman Act.

On March 17 and 18, 1977, and pursuant to Rule 850, Maryland Rules of Procedure, plaintiffs filed with the

[4] Maryland Rule of Procedure 885 states in part: "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried *and decided* by the circuit court . . . ." (Emphasis added). *Rippon* v. *Mercantile-Safe Deposit & Trust Co.*, 213 Md. 215, 222, 131 A.2d 695, 698 (1957).

Maryland Court of Appeals a timely Motion for Stay of Mandate and a Motion for Reconsideration.

On April 13, 1977, the Court of Appeals denied plaintiffs' Motions for Reconsideration and Stay of Mandate, and issued its mandate. (J.A. 45a). Plaintiffs filed timely notices of appeal with the Clerk of the Circuit Court for Anne Arundel County, Maryland. (J.A. 143a-54a). On July 1 and 8, 1977, plaintiffs docketed their appeals in this Court. On October 3, 1977, this Court noted probable jurisdiction of the appeals.

B. Facts Relating to the Commerce Clause Issue.

1. *The origin of petrolcum products sold in Maryland.*

No crude oil is produced or refined[5] into motor fuel in the State of Maryland. (J.A. 19a). Consequently, all motor fuel sold in Maryland is produced and refined outside of Maryland and transported into the State by pipeline, vessel or truck. (A. 194, 212, 214, 216, 223-24, 231, 255, 258). Motor fuel which enters the State is delivered either to storage tanks located in Maryland and from there to retail service stations, or directly to retail service stations.

2. *The retail marketing of petroleum products in Maryland.*

As the trial court found, the State readily conceded, and the Court of Appeals recognized, "the retail marketing of petroleum products in the State of Maryland is a highly competitive industry." (J.A. 99a, State's Brief in the Court of Appeals at 7, and J.A. 13a). In Maryland, petroleum products are purchased at retail by local consumers, by interstate travellers and by trucking and other transportation companies engaged in interstate commerce. (A. 196, 228-29).

[5] Since all the producing companies which operate service stations in Maryland are also refiners, hereinafter "producers and refiners" are sometimes referred to simply as "refiners."

There are two basic categories of retail service stations—major brand and private brand. Major brand stations are characterized by an advertised brand name and the sale of advertised brand name products, the availability of repair services, and the acceptance of credit cards.[6] (A. 306, 355). The overwhelming majority of major brand stations have been and are operated by independent dealers. (J.A. 99a). Private brand stations offer products bearing a brand name which is not widely advertised, offer limited or no repair services, accept no credit cards, and normally sell motor fuels at prices below those of major brand stations. (J.A. 98a-99a; A. 349-56, 452, 506-07, 516-17). The vast majority of private brand stations are company-operated. (J.A. 99a). The term company-operated means operated by a company with its own employees and under its own brand name.

As of July 1, 1974 there were approximately 3,800 retail service stations in Maryland. Of these stations, approximately 245, or six percent, were company-operated. Twenty-one different refiners sold motor fuels at retail through 209 of these company-operated stations (124 by major oil companies and 85 by non-major companies). (A. 190-91).[7] Appellant Exxon, as of July 1, 1974, had 532 retail outlets in Maryland of which 36 were company-operated (A. 196); Shell, as of September 4, 1975, had 194 of which only one was company-operated (A. 664); Gulf, as of September 1975, had 219 retail outlets of which only one was company-operated (A. 226); and Phillips, as of October 1, 1975, had 121 of which 13 were company-operated (A. 234). The relatively small percentage of company-operated stations

[6] With the growth of self-service stations over the last few years, some major brand stations are selling motor fuel on a partial or full "self-serve" basis. (A. 217, 317-18, 646-47).

[7] The designation of "major" and "non-major" companies is that of the Lundberg Survey, Inc., a widely used industry statistical organization. (A. 376). The remainder of the company-operated stations were operated by independent marketers which neither produce nor refine petroleum products. (A. 190-91).

in Maryland generally mirrors the percentage nationwide.[9]

3. ***Producers and refiners and their relationship to retail service station operations.***

There are also two basic categories of "producers and refiners"—major oil companies such as appellants Exxon, Shell, Gulf and Phillips, and independent oil companies such as appellants Commonwealth and Ashland.

The major oil companies are fully integrated, that is they produce, refine, transport and market petroleum products primarily through major brand stations operated by independent dealers. (J.A. 3a-4a). Some majors such as Exxon and Phillips also market petroleum products through a limited number of private brand stations. These private brand stations of the majors (such as Exxon's "Alert" and Phillips' "Way-Lo" brand) are company-operated. (A. 248-49, 313). In addition, Kayo, a subsidiary of Continental, engages solely in retail marketing of motor fuels in 18 eastern states through directly operated stations which offer motor fuel for sale at prices lower than those at major brand stations. Continental does not operate any service stations or sell its branded motor fuels ("Conoco") in Maryland. (A. 212, 348, 355-56).

Some of the major oil companies market petroleum products through a limited number of special types of service stations. Exxon, for example, has developed "Car Care Centers" which provide for comprehensive maintenance and repair of cars in addition to the sale of petroleum products (A. 197-98, 308-10); Gulf has developed "Tire Huts" which specialize in the sale of tires in addition to the sale of petroleum products (A. 648); and Shell has developed "Self Repair Centers" (A. 485, 666).[9]

[8] The record in this case shows, for example, that as of December 31, 1973, of 25,000 Exxon branded stations nationwide, approximately four percent were company-operated. (A. 197).

[9] While the picture presented in the record is, of necessity, a static one, and the overall outlines set forth herein are still valid, the service station industry continues to evolve. The growth of self-service and limited service outlets is an example of the evolutionary process. (A. 374, 407-08, 646-47).

Independent oil companies are partially integrated, that is, they engage only in refining and marketing, *e.g.*, Commonwealth, or they refine, market and engage in an insignificant amount of crude oil production in relation to their refining capacity, *e.g.*, Ashland. (J.A. 4a; A. 255-57). Apart from some dealer stations geographically close to Ashland's headquarters in Ashland, Kentucky which use the Ashland brand name, Ashland and Commonwealth market exclusively through lower priced, company-operated private brand stations.[10] (A. 449-50, 502-03).

4. ***Competitive importance of private brand operations.***

There are several reasons why the retail marketing of petroleum products in Maryland is "highly competitive," including: the large number of stations, the mobility of the consumer at the time of purchase, the availability of price information and the relatively small capital investment required to open a station. (J.A. 99a; A. 432-33, 473-74). The existence of lower priced, high volume, private brand stations, such as Kayo, Scot and others, as an alternative to major brand, full service stations, is also an important competitive factor, particularly since the private brand station competes principally on price, and not on service, brand image, or widespread brand availability. (A. 370-71).

The evidence clearly establishes that a critical factor in the successful operation of a private brand station is direct operation by the company through its own employees. (A. 357, 450, 454-55, 503-04, 508, 517). This is true for refiner-marketers, as well as for independent marketers, whether large or small. (*Id.*). Private brand

[10] Ashland markets under various names including "Bi-Lo," "Hi-Fi," "Payless" and "Red Head," and Commonwealth, through its subsidiary PMC, markets under the name "Scot." (A. 190-91).

marketing through dealers has been tried unsuccessfully by both refiner-marketers and independent marketers. (A. 450, 508, 517-18). One of the principal reasons is the need of the private brand marketer to control the price of the products sold. (A. 357, 450, 503, 517). Such control of the price can only be accomplished legally through stations operated by the marketers' own employees. (A. 454-55). *See Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). It cannot be accomplished through independent dealers. The testimony of witnesses on behalf of Ashland, Commonwealth and Kayo, which operate exclusively through company-operated stations in Maryland, is that they would have to abandon the sale of petroleum products at retail in the Maryland market if they could not operate their own stations. (A. 357-58, 457, 508). Since the vast majority of private brand stations are company-operated, the prohibition on company operation contained in Paragraphs (B) and (C) of the Maryland Act would make it economically infeasible for refiners marketing through private brand stations to continue marketing operations in Maryland.[11] The result would be to shut off interstate shipments from outside Maryland to these stations in Maryland. (A. 508).

In addition, the direct operational control allowed through use of company-operated stations is a practical necessity today for any marketer, large or small, major brand or private brand, seeking to enter a market where

[11] In reversing the trial court, the Maryland Court of Appeals noted that as to some of these operators no final corporate board decision had been made to withdraw from the Maryland retail market if the Act became effective. From this fact, the court drew the conclusion that it might still be possible for these private brand operators to sell their products to the public in Maryland through independent dealers. (J.A. 23a-24a). This conclusion was, however, contrary to the undisputed testimony that such marketers could not operate profitably in this manner. (J.A. 103a, 109a, 111a; A. 357-58, 360, 457-58, 508).

it has little or no brand recognition.[12] (A. 376-78). Exxon's experience entering the Florida market in 1962 is illustrative:

> [Florida] was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. . . . This was some five or six years later. . . . I would think less than five per cent are company operated at this time. (A. 317-18).

Other uses and benefits of company operation include enabling the refiner-marketer to observe directly the wants and needs of the consumer (A. 315, 649), to enhance brand acceptance by company participation in the full range of retail offerings, thereby benefiting all the company's branded dealers (A. 316), to engage in controlled experimentation as to differing gasoline marketing techniques (A. 205-09, 316-18, 381-82, 648, 665-67), to provide on-the-job training for dealers and company employees (A. 318, 670), to enable a supplier to fill a temporary need, as where a dealer unexpectedly vacates a station (A. 318-19, 669), to remedy consumer complaints (A. 319), and to obtain a retail profit (A. 316).

[12] While it cannot be said that a well-financed major brand company cannot under any circumstances expand into a new market without company operation, as both a practical and legal matter, the use of company operations greatly facilitates expansion into new markets. Conversely, the prohibition of company operation greatly burdens it.

5. ***Effect of Paragraphs (B) and (C) of the Maryland Act on the interstate operations of independent (partially-integrated) oil companies, major (fully-integrated) oil companies and non-integrated private brand marketers.***

Because of the important and diverse roles company-operated stations serve in the marketing activity of refiners, the Maryland Act's total ban on their use by producers and refiners has predictable adverse consequences on the various segments of the petroleum industry.

(*a*) Because private brand partially integrated companies, such as Ashland, Commonwealth and Hudson Oil Company, unlike the more fully integrated oil companies, cannot as a matter of industry economics adopt the dealer distribution method which the Act requires, they will be obliged to discontinue business in the State if the Act is upheld. (A. 357-58, 360, 457-58, 508). The Act, therefore, has the effect of forcing existing aggressive interstate competitors out of the Maryland market.

(*b*) For these partially integrated companies, such as Ashland and Commonwealth, company operations permit cost efficiencies resulting from integrating marketing with refining activities. The efficiencies result from the ability to maintain an assured flow of product from the refinery, thereby permitting refineries to be run at maximum levels. Maximum refinery runs are translated into lower average costs, and ultimately lower wholesale and retail petroleum product prices. Because of the capital intensive nature of a refinery operation, it is critical from an economic standpoint to have the refinery operating at peak levels. (A. 504-05, 531). This is accomplished for partially integrated companies in part through a controlled marketing arm for the refined products. (A. 531). For these companies, such as Ashland and Commonwealth, which market through company-operated

stations, these stations serve as the assured outlets. (A. 504, 531). For major oil companies such as Exxon, Shell and Gulf which market largely through independent dealers, the dealers serve as the principal outlet for petroleum products from the refineries.

(*c*) Another consequences of the loss of company-operated outlets in Maryland by companies like Ashland and Commonwealth is the adverse effect on the supply of petroleum products available to the wholesale market. Ashland, for example, is one of the principal sources of petroleum products for private brand independent marketers in Maryland. (A. 509, 623-24). Ashland uses its retail outlets to balance wholesale sales, which fluctuate greatly as wholesale prices vary. (A. 509). This balance must be maintained in order to operate at all in the State, because Ashland can only supply its Maryland customers by means of exchange agreements with other oil companies that deliver petroleum products directly into the State, and such exchange agreements cannot be maintained unless both parties are able to exchange products on a regular basis. (A. 509-10). Since it would be difficult for Ashland to remain in Maryland as a wholesaler if it lost its retail outlets, a likely result would be a diversion of its wholesale activities into other states. (A. 509). This would have an adverse effect upon independent gasoline marketers which are supplied at wholesale by Ashland.

(*d*) Because company-operated stations are essential for the private brand marketing of gasoline by partially integrated refiners, another effect of the Act is to preclude other partially integrated refiners marketing in other states from ever entering the Maryland market. Under a widely employed industry classification, there are 37 partially integrated refiners, five of which are currently represented in Maryland—Ashland, Commonwealth, Crown Central Petroleum Co., Amerada Hess Corporation and Tenneco Oil Company. (A. 376). The uncontradicted

evidence established that by prohibiting company operations by producers or refiners, the Act would effectively prevent the remaining 32 interstate competitors from entering the Maryland retail market (A. 376-77, 412), as the trial court found. (J.A. 130a).

(*e*) Because independent marketers sell their products predominantly through company-operated outlets, the effect of the Act is to prohibit independent marketers now operating in Maryland from strengthening their businesses by integrating backward into refining while still maintaining their stations in Maryland. The effect upon Hudson Oil Company, an aggressive, totally company-operated non-integrated marketer which sells its gasoline in 36 states including Maryland, is illustrative. (A. 516). At trial, the president of Hudson testified that the company planned to construct or acquire a refinery to provide the company with its own source of refined product. (A. 518). Subsequent to trial, Hudson did acquire a refinery and is now subject to the Act.[13] Now that Hudson has strengthened its competitive posture by integrating backward, the Act, if upheld, will require it to abandon its stations in Maryland. (J.A. 122a; A. 519).

(*f*) An absolute ban on company-operated stations will also adversely affect the major oil companies. The statute will effectively preclude the major oil companies from engaging in private brand low price marketing for the same reason it precludes partially integrated refiners from so doing, *i.e.*, an inability to establish individual retail prices. Moreover, the Act will adversely affect the major oil companies' dealer operations. The Act will eliminate the opportunities to observe directly the needs of the consumer, to enhance brand acceptance by engaging in competition in an extensive range of automotive repair

[13] Oil & Gas Journal, Annual Refinery Issue at 117 (March 28, 1977).

services and parts for the benefit of branded dealers, to test innovations and marketing methods and equipment, to provide on-the-job training for dealers and to remedy consumer complaints. (A. 205-09, 316-19, 381-82, 648-49, 665-70).

(*g*) The total ban on company operations by producers or refiners will interfere with the flow of petroleum products into Maryland from out of state and will cause a diversion of capital from Maryland to other states. (A. 383). The evidence made clear that at least some of the partially integrated refiners will be forced to close their stations if the Act is upheld. To the extent they do so, the flow of petroleum products from out of state to these stations will be diverted to other stations in Maryland or elsewhere. (A. 508). In addition, capital which would be invested in certain types of stations to be operated by refiners, will be channeled elsewhere. (A. 317, 320).

C. Facts Relating to the Robinson-Patman Act Issue.

Appellants sell gasoline and other petroleum products in interstate commerce to branded retail service station dealers in Maryland, who either lease the station from an appellant or third party or own the facility themselves. (J.A. 58a, 73a, 79a, 84a). Appellants grant temporary price reductions, or "competitive' or '"voluntary" allowances, to their branded retail dealers in order to provide competitive and equitable assistance in gasoline prices to those dealers injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers.[14]

[14] The facts contained in this discussion of voluntary competitive allowances are taken from the affidavit of Walter D. Naughton, Marketing Manager for Shell in the Southeast area of the United States submitted by Shell prior to trial on all issues. In a letter to the Honorable Eugene M. Childs, trial judge, counsel for Shell and counsel for defendants stipulated to the Naughton affidavit as

A competitive allowance is intended for use when a supplier's branded dealers suffer financial injury, in terms of loss of customers, reduced unit profit, or both, because a competing supplier lowers its price to its retail dealers. By meeting its competition through reduced product cost to its dealers, a supplier enables its dealers to remain competitive and thus retain the business of their customers.[15] (A. 671). Shell, like the other appellants, will grant a competitive allowance after it determines that such an allowance to Shell dealers is necessary to meet the equally low price of a supplier(s) in competition with Shell on the same functional level. Shell will not grant a competitive allowance to a dealer facing a lower retail price of a competing brand sold by a competing dealer *unless* that lower retail price *is financed by the competing dealer's wholesale supplier—a competitor of Shell.* (A. 673-74).

In authorizing competitive allowances to affected dealers, appellants utilize basic geographic areas called "trade" or "trading" areas. A trade area is a small specific geographic area in which competitive marketing conditions are substantially the same. All service stations within a trade area have exposure to substantially the same customers and therefore the ability to compete with one another on a relatively equal basis. There are one or more, usually several, service stations in each trade area. The areas may be of various sizes with the smaller ones generally in the more densely populated metropolitan dis-

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evidence. (A. 658). This affidavit incorporates virtually verbatim a previous Naughton affidavit submitted in support of Shell's motion for partial summary judgment directed to Paragraph (D). (A. 157). As a matter of convenience, reference herein is to the subsequent longer affidavit agreed to by the parties.

[15] When Shell or other appellant grants an allowance it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will reflect the lower cost by reducing the retail price is a decision solely within the dealer's discretion. (A. 674-75).

tricts where the customer potential is concentrated; larger ones are more characteristic of less populous areas or corridors along heavily traveled arterials where commuter or transient travel is heavy over considerable distances. A metropolitan area normally would be comprised of a number of trade areas. Decisions with respect to appellants' geographic delineation of competitive trade areas are based on such factors as physical barriers, population distribution and the location of the retail stations of competing brands. In a particular "price war" situation factors such as the amount and duration of the price difference are given consideration. (A. 671-73).

Like other appellants, if Shell grants a competitive allowance to a dealer, it is Shell's policy to offer an equal allowance to all Shell dealers in the same trade area. To the extent necessary to avoid competitive injury, allowances in appropriate competitive amounts are also given to Shell dealers in adjoining trade areas. The amount of such allowances decreases as the distance from the trade area increases. (A. 674).

The application of Paragraph (D) to competitive allowances granted by appellants is clear and undisputed. Whenever an appellant responds to competitive pressures from a competing supplier(s) and grants a competitive allowance to any dealer located in Maryland, Paragraph (D) expressly requires appellant to extend the same competitive allowance uniformly to all other dealers located throughout Maryland. Such an extension is required notwithstanding the fact that the particular competitive situation may be confined to a single or small number of trade areas.

SUMMARY OF ARGUMENT

I. Paragraphs (B) and (C) of the Maryland Act are Invalid Under the Commerce Clause.

The facts set forth in the Statement of the Case show that interstate commerce will be both discriminated against and unduly burdened by the prohibition contained in Paragraphs (B) and (C) of the Act against the operation of service stations by producers and refiners, the products of which are all produced and refined outside of Maryland and shipped into the State.

All producers and refiners, large or small, major brand or private brand, are barred from the Maryland retail market by reason of the nature of their out-of-state activity. The practical effect is to impede any refiners not currently marketing their products in Maryland from entering the Maryland market, and to exclude from the market the independent or smaller, and usually private brand refiners now there, such as appellants Ashland and Commonwealth as well as refiner-marketers such as Hudson Oil Company which the evidence shows can remain competitive only by selling at lower prices through company-operated stations.

The Act clearly requires that stations be operated by retail dealers, and its purpose was unquestionably to benefit local dealers at the expense of the refiners which compete with them. The 1975 Amendment to the Act which provides that

> [t]he station must be operated by a retail service station dealer

is unmistakable evidence of the Act's purpose to protect local dealers from the competition of refiners operating in interstate commerce. This discriminatory purpose and effect condemn the Act, almost *per se*, and, in any case, where, as here, reasonable non-discriminatory alternatives

more clearly attuned to the accomplishment of the professed statutory objectives are available.

The Maryland prohibition against refiner-operated service stations has the effect of preventing refiners from shipping motor fuel to their present company-operated outlets or to any new ones. Further, as an economic matter, it bars from the State refiners which might desire to enter, and forces the existing independent refiners out of the State. It also precludes any non-integrated marketer which uses company-operated stations in Maryland from strengthening its competitive position in the petroleum industry by constructing or acquiring a refinery without being required to give up its stations in Maryland.

States may not impose such burdens on interstate commerce which clearly constitute interferences with the natural functioning of the interstate market. These burdens substantially outweigh the claimed advantages to local interests in the State which are claimed to be the need for fair allocation of fuel supplies in time of shortage, and the need to protect against diminution of competition. Both of these claimed local benefits can be, and in fact are, controlled by other legislation. Paragraph (F) of the Act mandates fair and equitable allocations of motor fuel supplies during a period of shortage. With producers and refiners operating only 209, or about 6 percent, of the approximately 3,800 stations in Maryland and with the trial court finding, the State conceding and the Court of Appeals recognizing that the sale of petroleum products in Maryland is "highly competitive," the local need to protect the competitive vigor of the retail petroleum market in Maryland (as opposed to protecting local dealers from out-of-state competition) with such draconian methods is slight indeed. Nor can there be doubt that the principal competitive effect of the statutory prohibition would be to eliminate the low-price com-

petition of the independent private brand refiner-operated stations.

The interrelationship between the operation of the retail market and of the refiners which supply it exemplifies the fact that the petroleum industry is highly complex and functions on a national scale. Its structure is of national, not local, concern, and such efforts at control by an individual state necessarily have the effect of unduly burdening interstate commerce.

II. Paragraph (D) of the Maryland Act is in Conflict with the Robinson-Patman Act.

Appellants' appeal with respect to Paragraph (D) of the Maryland Act, which requires uniform statewide voluntary allowances, presents a classic situation requiring the application and enforcement of the Supremacy Clause of the United States Constitution. Paragraph (D) must be struck down because it is in actual, direct and irreconcilable conflict with superior federal law—the Robinson-Patman Act. First, compliance with Paragraph (D) exposes a seller to potential liability under the Robinson-Patman Act. Second, Paragraph (D) frustrates the full effectiveness of the Congressional purposes underlying Sections 2(a) and 2(b) of the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act requires that a seller's discriminatory price reductions granted to meet the equally low price of a competitor be limited to a specific competitive situation presented by the seller's own competitor. In contrast, under Paragraph (D) of the Maryland Act a supplier is required to extend a competitive allowance to all dealers in Maryland whenever it grants such an allowance to any dealer even though such an extension of the price reduction (and consequent price discrimination) could not be justified as responsive to the price reductions of a competitor.

In an effort to eliminate the conflict between Paragraph (D) of the State law and the Robinson-Patman Act, the Maryland Court of Appeals held that Section 2(b) of the federal law only protects price discriminations which result from a seller reducing its price to a particular purchaser that has received a lower price offer from the seller's competitor. The Maryland court's narrow reading of the meeting competition defense is contrary to the uniform position of the Department of Justice and the Federal Trade Commission, the federal agencies responsible for enforcement of the Robinson-Patman Act, and the construction given Section 2(b) by the lower federal courts. The agencies and the courts both have recognized that Section 2(b)'s "meeting the equally low price of a competitor defense" is a complete and absolute defense to price discrimination created when an appellant grants a "competitive allowance," whereby it reduces its price to its branded service station dealers to meet a price cut by a competing supplier to that supplier's dealers. The Maryland court rejected these authorities, thereby engrafting a debilitating and artificial limitation onto Section 2(b) which is directly at odds with the specific Congressional purposes embodied in Sections 2(a) and 2(b) as well as with the broad antitrust goal of fostering competition at all levels of distribution.

Properly construed, Section 2(b) sanctions price differences created by the granting of price reductions for the purpose of meeting the equally low price of a competitive supplier to that supplier's dealers. So construed, there is a [illegible]ld irreconcilable conflict between the Robinson-Patr[illegible]ct and Paragraph (D).

First, the Maryland court ignored the fact that the requirement of Paragraph (D) to extend a lower price beyond the area necessary to meet competition creates a price difference between prices charged in Maryland and prices charged elsewhere. Where the effect of the ex-

tension of the lower price "may be substantially to lessen competition," the price differences are *prima facie* violative of Section 2(a) of the Robinson-Patman Act and are not protected by Section 2(b) because the statewide lower price creates price differences which are not confined to the initial area necessitating the price reduction. Such statewide territorial price discrimination may cause competitive injury to competitors of the supplier (primary-line) or to the supplier's dealers (secondary-line) that are located across the Maryland state line and that compete with the supplier's dealers in Maryland. Accordingly, compliance with Paragraph (D) requires appellants to violate Section 2(a) of the Robinson-Patman Act without the protection of Section 2(b) and must be struck down on that ground.

Second, Paragraph (D) is inconsistent with and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Sections 2(a) and 2(b). In enacting Sections 2(a) and 2(b), Congress intended to reconcile the policies of the Sherman Act and the Robinson-Patman Act by permitting price discriminations which would promote price flexibility and competition while prohibiting price discriminations which were destructive of competition. By requiring a seller to grant the same competitive allowance to all the seller's dealers in Maryland whenever the seller grants such an allowance to any dealer, Paragraph (D) eliminates the Section 2(b) defense, ignores the competitive injury requirement of Section 2(a) and disrupts the balance struck by Congress between the Sherman and Robinson-Patman Acts.

III. Paragraph (D) of the Maryland Act Is Invalid Under the Commerce Clause.

By effectively requiring a supplier to extend a voluntary allowance to all its Maryland dealers if it should grant an allowance to even one dealer located near

Maryland's border, the likelihood that a seller will grant an allowance to such non-Maryland dealers is greatly inhibited, if not totally eliminated. The Maryland Act thereby interferes with and impedes the natural functioning of interstate commerce. Further, the State has failed to justify Paragraph (D) in terms of proper local benefits and unavailability of less restrictive alternatives.

ARGUMENT

I. PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT, WHICH PROHIBIT PRODUCERS AND REFINERS FROM OPERATING SERVICE STATIONS IN MARYLAND, ARE INVALID UNDER THE COMMERCE CLAUSE.

Paragraphs (B) and (C) of the Maryland Act require all producers or refiners of petroleum products to cease operating all company-operated retail service stations in Maryland. Since there is no producing or refining in the State of Maryland, the practical effect of the statute is to eliminate altogether the competition of all interstate producers or refiners, both large and small, from the Maryland retail service station market and to require consumers to purchase substantially all their motor fuel requirements from local dealers. The record demonstrates that an important economic consequence of the Act is to bar from the Maryland market the independent private brand refiner-marketers which provide a substantial portion of the low-priced competition.

This Court has identified at least three ways that state legislation may violate the strictures of the Commerce Clause: (1) it may discriminate against interstate commerce; (2) it may unduly burden interstate commerce; or (3) it may deal with a subject which is by its very nature regional or national in scope and therefore not amenable to state regulation. Paragraphs

(B) and (C) transgress the Commerce Clause for all these reasons.

Where a state statute either on its face or in its "practical effect" does not regulate "evenhandedly" to carry out a legitimate local interest, but rather discriminates against interstate commerce, then this Court has said that "*the burden falls on the State* to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve local interests at stake." *Hunt* v. *Washington State Apple Advertising Commission*, —— U.S. ——, 97 S. Ct. 2434, 2446 (1977) (emphasis supplied).

Where the only, the principal or the intended effect is to favor businessmen or operations in the home state over persons or activities outside the state, such laws have invariably been held invalid and may be said to be at least presumptively illegal, *per se*. *See, e.g., Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Toomer* v. *Witsell*, 334 U.S. 385 (1948); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Likewise, such an effect "on commerce has been declared to be virtually *per se* illegal," "[e]ven where the State" can be said to be "pursuing a clearly legitimate local interest." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

On the other hand, in the absence of any apparent discrimination against interstate commerce, where a state law which purports to regulate a "legitimate local public interest and its effects on interstate commerce are only incidental," this Court has employed the balancing test enunciated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142, and recently reaffirmed in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371 (1976).

It is submitted that the Act cannot stand under any of the foregoing tests, whether the Act is viewed as a

"discrimination" or a "burden." The injury to the free flow of interstate commerce is substantial, any local benefit is minimal, and in any event the latter can be and is adequately promoted by alternative measures having a lesser impact on interstate activities.

A. Paragraphs (B) and (C) of the Maryland Act Discriminate Against Interstate Commerce.

The effect of Paragraphs (B) and (C) of the Maryland Act is to create a protected enclave for Maryland independent dealers against competition from without the State by mandating the use of independent dealers to the exclusion of producers and refiners for the retail sale of petroleum products. Since motor fuel is neither produced nor refined in Maryland, it is only by reason of their out-of-state producing or refining activities that companies become ineligible to compete in the Maryland retail petroleum market. As a result, interstate marketers which own refineries are forced to surrender the stations they operate in Maryland and to abandon any plans they have for other stations. Potential entrants into the Maryland market which must at least start with company-operated stations, are denied entry. Also, nonintegrated marketers which employ company-operated stations and which in the future develop a refining capacity, will have to forfeit their Maryland stations.

It is clear that the protection of Maryland independent dealers was at least one, if not the main, object of the Maryland Legislature, as the 1975 amendments demonstrate. Paragraphs (B) and (C) of the original Act of 1974, which stated that producers and refiners could not open or operate retail service stations, were both amended in 1975 to add the unequivocal provision that

> [t]he station must be operated by a retail service station dealer.

This shows that it was the clear and specific intent of the Maryland Legislature that the Maryland dealers were to be the principal beneficiaries of the Act."[16] Thus the case at bar presents "the rare instance where a State artlessly discloses an avowed purpose to discriminate against interstate goods" to benefit local dealers. *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951); *Hunt* v. *Washington State Apple Advertising Commission*, 97 S. Ct. at 2445.

Even without regard to any direct manifestation to favor local dealers, the Maryland Act would nonetheless have a discriminatory effect. The Commerce Clause "forbids discrimination" against interstate commerce "whether forthright or ingenious." The issue is whether a state law "will in its practical operation work discrimination against interstate commerce." *Best & Co., Inc.* v. *Maxwell*, 311 U.S. 454, 455-56 (1940). Other authorities also establish that the "practical effect" of the state or local regulations is determinative. *Hunt* v. *Washington State Apple Advertising Commission*, 97 S.Ct. at 2445-46; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 375; *Dean Milk Co.* v. *Madison*, 340 U.S. at 354.

The decisions by this Court establish that a statute prejudicial to out-of-state competitors is not saved because it also may be harmful to some intrastate residents as well. Milk from most of Wisconsin, as well as Illinois, was barred by Madison's five mile limitation, but the Court in *Dean Milk* found it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." (340 U.S. at 354). *See also Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891); *Minnesota* v. *Barber*,

[16] The record contains testimony in support of the bill by the Executive Director of the Greater Washington/Maryland Service Station Association. (A. 755-61).

136 U.S. 313, 326 (1890). As the Court stated in *Brimmer*:

> [A] burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. (138 U.S. at 82-83).

Similarly in *Nippert* v. *Richmond*, 327 U.S. 416, 432 (1946), the Court, in holding unconstitutional Richmond's tax on solicitors, recognized that the tax "may strike as heavily upon some Virginia solicitors . . . as it does upon others who come" from other states. Although the Richmond ordinance "does not discriminate on its face between [local retail] merchants and transient solicitors" (*id.* at 433 n.24), the "fixed substantial sum" of the tax imposed during the first year (*id.* at 427), after which only a small percentage was due, made the tax "not only burdensome but prohibitive" for "the small operator particularly and more especially the casual or occasional one from out of state" (*id.* at 429). The Court found this "discrimination . . . as between out-of-state solicitors and regular retail merchants . . . only less obvious" but "not less real" than that in *Best & Co., Inc.* v. *Maxwell*, 311 U.S. 454 (1940), where the North Carolina law fixed a lower rate for the latter. (327 U.S. at 433 n.24). The Court concluded in *Nippert*:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only

to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position. (*Id.* at 431).

These authorities establish that the mere fact that the Maryland Act would apply to Maryland producers and refiners, if there were any, does not immunize it from challenge under the Commerce Clause.

The Court's most recent decision on the subject, *Hunt* v. *Washington State Apple Advertising Commission*, —— U.S. ——, 97 S. Ct. 2434 (1977), is analogous in various respects to the case at bar, although the Maryland Act is also discriminatory on its face. The discriminatory impact of the North Carolina statute involved in *Washington Apple* appeared not on the face of the statute but from its practical operation. The prohibition against the display of all grades on closed containers of apples applied, on its face, to North Carolina apples as well as to Washington apples, but North Carolina had not prescribed any state grading system as had Washington. *Id.* at 2440. Thus, the effect of the North Carolina prohibition was only on out-of-state producers, just as the effect of the prohibition here is only on out-of-state refiners engaged in these activities outside Maryland, since there is no production or refining carried on in Maryland. Further, in *Washington Apple* there were "indications in the record" that the "discriminatory impact on interstate commerce was not an unintended by-product." (*Id.* at 2446). The indications that the purpose was to benefit the local dealers are even stronger here.

The North Carolina statute was also "somewhat suspect" because the closed containers did not reach the consumers who ostensibly were to be protected against the alleged confusion as to grading. Likewise, the Maryland Act, which is ostensibly designed to preclude refiners from discriminating against stations operated by independent dealers and to maintain competition, has its

most harmful effect on refiners which do not sell to independent dealers. Therefore, such independent refiners could not discriminate against dealers and, in fact, must and do sell at lower prices through company-operated private brand stations in order to survive. The independent dealers will be the primary beneficiaries of the elimination of this competition. It is the consumer who stands to lose. (J.A. 130a; A. 367, 429-30, 472).

The discriminatory effects of the Maryland Act are more severe than those of the North Carolina law struck down in *Washington Apple*. In contrast to *Washington Apple*, where the state statute merely increased the costs to the Washington apple growers, the uncontroverted testimony in this case established that certain refiners would be forced to withdraw from the Maryland market if the Act were upheld. (A. 357-58, 360, 457-58, 508).

Moreover, the "leveling effect" caused by the North Carolina statute's requirement that Washington apples be marketed with inferior grade symbols operates less overtly to favor local apple producers than does the Maryland Act to favor local service station dealers. The competition which service station dealers fear from stations operated by out-of-state refiners is destroyed by the Maryland law, which requires that all stations "be operated by a retail service station dealer."

After considering the type of discrimination produced by the North Carolina statute, the Court in *Washington Apple* stated that the state must "justify it in terms of local benefits . . . and the unavailability of adequate nondiscriminatory alternatives", and that "North Carolina has failed to sustain that burden on both scores." (97 S.Ct. at 2446). Maryland falls even shorter in sustaining its burden. The Maryland prohibition "does remarkably little to further [its] laudable goal" (*id.*) of promoting competition and fair allocation in time of shortage.

B. Paragraphs (B) and (C) of the Maryland Act Impose a Significant Burden on Interstate Commerce.

This Court has made it clear that regulations which increase operating costs, impair efficiency, and hamper the competitive position of interstate competitors constitute an undue burden on interstate commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 143; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 366. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976), this Court pointed out that the "common thread" running through the Court's decisions is that a state may not interfere "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." Paragraphs (B) and (C) impose burdens which are as severe as those considered in *Pike* and *A & P*.

The Act affects all refiners and potential refiners of petroleum products operating in interstate commerce, although the burden falls most heavily on independent refiners which traditionally rely to a much greater extent on company-operated stations to market gasoline than do the major oil companies. The Act burdens interstate commerce: (1) by eliminating existing interstate competitors from the Maryland market; (2) by imposing a formidable obstacle on out-of-state competitors desiring to enter the Maryland market; (3) by discouraging the expansion of refinery capacity by independent refiners and marketers and by interfering with interstate wholesale markets; (4) by interfering with the ability of major oil companies to respond to changing consumer needs; and (5) by obstructing the flow of petroleum products and capital into Maryland.

1. *The Act eliminates existing interstate competitors from the market for the sale of petroleum products in Maryland.*

The Act makes it economically prohibitive for integrated private brand marketers, including appellants Ashland, Kayo, and PMC, to continue marketing their products in Maryland. The testimony in this case established that marketers which sell brands of gasoline with little consumer recognition in a given market must retail their products at prices lower than those at which advertised brands are sold. (A. 356, 502-03). Such marketers have tried dealer operations and found they cannot compete effectively because legally they cannot control the price of the product sold as well as for other business reasons. (A. 450-55, 503-04, 517). For example, the President of Hudson Oil Company testified that when Hudson experimented with dealer stations, which involved about 30 of its then 120 stations, it "completely lost control of [its] stations. We had dirty stations. The dealer would not carry out the orders, and of course we did not and were not able to enforce certain regulations because they were leased out; and we cancelled our leases and took the stations back over." (A. 517-18, 521).[17]

Company-operated stations are the only viable marketing avenue for such private brand marketers, whether nonintegrated or integrated. Ashland's experience is illustrative. Near its home territory in Ashland, Kentucky, Ashland markets primarily through independent dealers because of the local public's recognition and acceptance of the Ashland brand. In markets distant from its home territory, such as Maryland, lack of such brand acceptance dictates that Ashland market exclusively

[17] At the time of the trial, Hudson was a non-integrated marketer, but was contemplating constructing a refinery. Subsequent to the trial, Hudson acquired a refinery and is therefore subject to the Act. Oil & Gas Journal, Annual Refining Issue at 117 (March 28, 1977).

through company-operated private brand outlets. (A. 501-03). This reliance upon company-operated stations is the usual practice by private brand marketers throughout the industry and independent refiners in particular. (A. 503, 517, 529).

By precluding company-operated stations, the immediate effect of the Maryland Act is to banish this type of interstate competitor from the Maryland market. If the individual states have such power and if others enact similar legislation, the effect could be either to eliminate many or all of the integrated private brand low-price competitors completely from the interstate market, or to subject them to a variety of different state laws which in itself would impair their ability to conduct an efficient and competitive interstate enterprise. As this Court noted in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 381, a state statute, the practical effect of which is to exclude from the market the products of certain interstate competitors, constitutes a "hinderance" and a "clog" upon the mobility of commerce and an undue burden on the free flow of commerce.

A no less significant effect of the Act is to bar all out-of-state producers and refiners, major brand or private brand, from operating directly any retail service stations. Producers and refiners now operating approximately 209 retail stations will be prohibited from continuing to compete in the retail market in Maryland should the Act become effective. This absolute ban from the retail market in Maryland is itself an undue burden. *Dean Milk Co.* v. *Madison*, 340 U.S. at 354. This Court's invalidation in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 146, of an Arizona statute which imposed a "straitjacket" upon the interstate operations of only *one company* applies with greater force to the Maryland Act, which by requiring the use of dealers imposes a "straitjacket" upon a significant portion of *an entire industry*.

2. The Act imposes a barrier to entry by out-of-state competitors into the Maryland market.

One of the principal effects of the Act is to create a substantial barrier to entry into the Maryland retail petroleum product market by new out-of-state competitors. Entry into the Maryland market and other markets by such refiners is not an isolated occurrence. (A. 256, 357, 378, 506). The Act, however, as a practical matter, precludes producers and refiners not currently distributing their products in the Maryland market from entering. This is particularly true for private brand marketers which need to rely wholly or principally on company-operated stations. Major brand marketers have found it necessary to use company operations to enter new markets as exemplified by Exxon's entry into Florida. (A. 317-18). If Exxon was unable to enter a new market without initially operating its own stations, marketers with less resources would have at least the same difficulty. (A. 378).

Given Exxon's experience and the fact that companies which rely principally on company-operated stations would be kept out of the Maryland market, there is every reason to believe, as the trial court found, that the 32 of the 37 partially integrated private brand marketers presently not selling their products in Maryland would be kept out by the Maryland Act. (J.A. 130a; A. 376-77). Such exclusion from the Maryland market is inconsistent with this Court's view, as set forth in *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949), that "every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, . . . and no foreign state will by customs duties or regulations exclude them." In *Hood* the Court held unconstitutional as an undue burden on interstate commerce the denial of a license to an out-of-state milk handler to expand its milk handling facilities. This Court

noted that the state's argument in support of the prohibition on expansion, "if sustained, would be equally effective to exclude an entirely new foreign handler from coming into the state to purchase." (*Id.* at 540). This it could not do.

Such exclusion is also inconsistent with the views expressed by this Court in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973), and *FTC* v. *Procter & Gamble*, 386 U.S. 568, 581 (1967), that the elimination of potential competitors "waiting in the wings" can have an adverse effect on competition.

3. *The Act impairs the growth and competitive position of independent refiners and marketers.*

The Act impairs the growth and competitive position of independent refiners and marketers by precluding backward and forward integration, by impeding refinery operations, none of which are located in Maryland, and by interfering with interstate wholesale markets.

Since independent refiners do not have access to an assured source of crude oil for their refineries, they are especially vulnerable to supply interruptions and wide fluctuations in the cost of the crude oil. (A. 531). The capital intensive nature of the refining business means that reduced supply of crude oil impacts severely on the per unit cost of refined products. (A. 528-29).

The response of independent refiners to these problems has been to seek assured outlets for their products so as to maintain continuous refinery output. (A. 504, 531). The major oil companies achieve the same objective by establishing brand recognition and by marketing through retail dealers who purchase their products for resale at branded outlets. (A. 526). Most independent refiners simply do not have the financial resources to develop the brand recognition which the dealer form of

retail marketing requires and therefore do not market through dealers. (A. 502-03, 527-28). Consequently, independent refiners, because of their competitive position, substantially rely on company-operated stations which sell private brand gasoline at discount prices. (A. 190-91, 529). Such stations are relatively easy to establish, since customers are attracted by the lower prices. (A. 503).

The Maryland Act, by precluding assured outlets for independent refiners like Ashland and Commonwealth that market primarily or exclusively through company-operated stations, undermines the competitive position of such refiners operating in interstate commerce.[18]

The Maryland Act also bans non-integrated private brand marketers of gasoline from operating retail service stations if they integrate backwards into refining in order to improve their competitive position. Backward integration has been a traditional form of growth in the petroleum industry. (A. 379). At the trial, Mary Hudson, President of Hudson Oil Company, which sells in 36 states exclusively through company-operated outlets (over 300 stations nationwide, including 5 in Maryland), testified that Hudson was planning construction or purchase of a refinery. (A. 516, 518). While acquisition of the refinery would strengthen Hudson's competitive posture, she stated that if the Maryland Act is upheld, "[w]e would have to dispose of our stations here in Maryland and, of course, we do not want to do that." (A. 518-19).

Any inhibiting effect on backward integration caused by the Maryland or similar statutes in other states necessarily has an adverse effect upon the expansion of United States refining capacity, which the State's expert

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[18] As such it is inconsistent with the Congressional objective reflected in Sections 4(b)(1)(D) and (F) of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. §§ 751 *et seq.* (Supp. 1975)) to preserve independent refiners as a competitive force in the market.

witness acknowledged to be an anti-competitive effect of the Maryland law. (A. 632, 639-40). The adverse impact on national refinery capacity conflicts directly with the national policy formulated by Congress and articulated by federal agencies charged with the responsibility of carrying out those federal policies of encouraging the expansion of refinery capacity in the United States. The Energy Conservation and Production Act of 1976, 90 Stat. 1125 (1976), provides that the administrator of the FEA is to insure that regulations do not impose unreasonable barriers to entry for small refiners and independent refiners.[19]

Moreover, the legislative mandate banning retail marketing operations by a number of the present competitors in the Maryland market, such as Ashland and Commonwealth, would also affect the distribution of supplies by them at the wholesale level. Companies like Ashland, in addition to being retailers, serve as a principal source of supply for independent marketers. (A. 509, 623-24). Ashland uses its retail outlets to balance wholesale sales, which fluctuate in volume as wholesale prices change. Ashland presented evidence that it would be extremely difficult to remain in Maryland as a wholesaler if it lost its retail outlets, and that the likely result would be the diversion of its activities into other states. (A. 509-10). The result would be a reduction in supplies available to independent gasoline marketers in Maryland. (A. 509).

There can be no doubt that the effects of the Maryland Act are to impair the efficiency of the independent oil companies' refining operations, increase their costs of

[19] John Sawhill, then administrator-designate of the Federal Energy Administration, testified before Congress on the need for incentives for the construction of new and independent refining capacity in the United States. Hearings on Oil Refinery Development Act before the Senate Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 263, 274-75 (1974).

operation, eliminate their marketing operations in Maryland, and reduce the flow of petroleum products. These effects on the interstate operations of independent refiners and marketers show that the ruling below upholding the Maryland Act is not consistent with the rationale of this Court's decisions in *Pike*, *A & P* and *Alexandria Scrap*.

4. *The Act interferes with the ability of major oil companies to respond to changing consumer needs.*

Ironically, the burden of the Act, the purpose of which is supposedly to preserve competition, falls most intensively on independent refiners rather than on the larger, fully integrated oil companies, since the former rely to a much greater extent on company-operated outlets. (A. 190-91). The independent refiners furnish vigorous price competition, and their practical exclusion from the Maryland market will bear heavily on consumers. (A. 429, 532). Nevertheless, appellants which market at retail predominantly through the use of independent dealers, are also adversely affected by the elimination of their company-operated stations in Maryland, which are an important part of their marketing format. Major oil companies directly operate a number of retail stations in Maryland and elsewhere for a variety of purposes, including gaining entry into new geographic markets, familiarizing themselves first-hand with the wants and needs of the consumer, providing dealer training, testing innovations in marketing methods and equipment, engaging in competition in a more extensive range of automotive parts and repair services and obtaining a retail profit. (A. 205-09, 315-19, 381-82, 648-49, 665-70). The Maryland Act's prohibition of such operations impairs the ability of such interstate companies to compete effectively in the product and service markets involved.

Such an impediment, which strips away the competitive advantages derived from the interstate operations of

major oil companies, is of a nature which the Court found impermissible in *Washington Apple*.

5. ***The Act obstructs the flow of petroleum products and capital into Maryland.***

As noted, one effect of the Maryland Act is to preclude independent refiners from engaging in the marketing of petroleum products in Maryland. At least some of the stations now operated by independent refiners will be closed if the Act becomes effective. The necessary result will be the termination of interstate shipments of petroleum products from outside Maryland which would have gone to the stations which close. In addition, by virtue of the balance that needs to be maintained by companies like Ashland between wholesale sales to independent marketers and company operations, the prohibition on company operations will necessarily adversely affect Ashland's ability to sell on the wholesale market to independent marketers in Maryland.

An additional effect of the Maryland Act is to divert the flow of capital from Maryland to other jurisdictions. (A. 383). Two examples illustrate the point. Witnesses for Exxon pointed out the importance of company operations in the development and promotion of specialized service stations such as comprehensive "Car Care Centers" which among other things provide a nationwide guaranty. (A. 310, 319-20). Witnesses for Gulf indicated the importance of company operations in their efforts to enter the self-service field. (A. 646-47).

The Court in *Pike* noted that the practical effect of the Arizona statute was to require an out-of-state cantaloupe grower to maintain a packing plant in Arizona, and that such a requirement, which increased costs, diverted business and employment opportunities and imposed an artificial rigidity on the economic pattern of the industry, could

not be justified in light of the "tenuous" interest of the state in promoting Arizona-grown cantaloupes. Similarly in the present case the requirement that service stations be operated by dealers, which will result in increased costs and the diversion of petroleum products and capital from Maryland, cannot be justified by any of the asserted local interests involved.

6. ***The Maryland Court of Appeals' analysis is inconsistent with this Court's treatment of Commerce Clause problems.***

a. *The Maryland Act clearly does not "merely regulate a wholly intrastate activity."* The Maryland Court of Appeals found that the Act does not violate the Commerce Clause because it "merely regulates a wholly intrastate activity, the retail marketing of gasoline within the state." (J.A. 18a).

First, the assumption that petroleum retailing is a wholly intrastate activity is insupportable. Sales of motor fuel coming from outside the State to local distributors or retail service stations, even after storage for a considerable period, were held to be *in* interstate commerce in *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 236-38 (1951). Clearly the delivery to and receipt of fuel by the service stations operated by out-of-state refiners is a part of interstate commerce, and to prohibit such stations from operating in the State, is to bar them from such commerce. *See also Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Second, as this Court noted in *Nippert* v. *Richmond*,

> the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which

> it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local" and thus achieve its desired result. (327 U.S. at 423).

See also United States v. *Women's Sportswear Manufacturers' Association*, 336 U.S. 460, 464 (1949), where this Court stated in a somewhat different context that "if it is interstate commerce that feels the pinch it does not mater how local the operation which applies the squeeze."

Here all appellants would suffer financial losses and have the efficiency of operations impaired if they were forced to dispose of their company-operated stations. Ashland, Commonwealth and Kayo would be forced out of the Maryland market completely and thus deprived of their ability to compete in interstate commerce.

Just as the Commerce Clause authorizes Congress to regulate interstate conduct where it has an effect on interstate commerce, so also it places limits upon state regulation of intrastate conduct which has an effect on such commerce. Certainly a state could not prohibit its retailers from selling goods produced in other states, on the theory that it was only regulating an intrastate or local activity. Nor could it impose a greater tax on retail sales of such goods, as *Best & Co., Inc.* v. *Maxwell* and *Nippert* v. *Richmond* demonstrate. In *Nippert*, the Court made explicit that the effect of the local tax—and the same principle would apply to a state regulation—upon commerce was the decisive question:

> [W]hether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce. (327 U.S. at 424).

Indeed, it would seem obvious that when the question is whether a state law discriminates against or unduly burdens interstate commerce, what is relevant is the effect on commerce and not whether the incident to which the regulation attaches is said to be interstate or intrastate.

b. *The Maryland Act will cause a shift in the flow of petroleum products brought into the State.* The Maryland Court of Appeals was of the view that the Maryland Act could not be said to burden interstate commerce because it did not limit or diminish the amount of petroleum products which could be brought into the State, or limit the availability of such products to persons traveling in interstate commerce. (J.A. 23a-24a).

Decisions holding that the Commerce Clause is designed to preclude "interference with the natural functioning of the interstate market" demonstrate that the limitation upon state regulation is not that narrow. Many of the state laws held invalid would not have reduced the quantity of a commodity which entered the state. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Toomer* v. *Witsell*, 334 U.S. 385 (1948). Thus even if the total flow is not diminished, this does not save the Act. Since certain interstate competitors will be forced out of the Maryland market and the interstate shipments into Maryland will be diverted to others, the Act will undoubtedly cause a shift in the flow of commerce.

This Court has made it clear that commerce may be burdened impermissibly in ways more subtle than by simple prohibitions on imports. Regulations which increase operating costs, impair efficiency, and hamper the competitive position of participants in interstate commerce by diverting the commerce to others may also offend the Commerce Clause. The North Carolina statute before the Court in *Washington Apple* did not bar anyone from bringing apples into the state. The effects which the Court found discriminatory were the raising of

the costs for the Washington apple growers and the loss of their legitimate competitive advantages to the benefit of local apple producers. Similarly, the extrastate solicitors in *Best* and *Nippert* were subjected to a handicap which made it more difficult for them to compete with local merchants. In *Pike* the producer of cantaloupes was not barred from exporting them to California, but was required to spend $200,000 to build a new packing plant in Arizona. *See also Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977).

The record in this case establishes that the Maryland law has as one of its principal purposes the protection of local dealers against competition from interstate competitors. The record also establishes that the practical effect of the Act is to exclude substantial portions of the petroleum industry from competition in the Maryland market and to create a protected enclave for local dealers. The burdens placed by this Act on the mobility of interstate commerce are thus substantial. As will be shown, these burdens cannot be justified in terms of protecting legitimate local interests.

C. The Maryland Act's Prohibition on the Operation of Retail Stations by Producers or Refiners Affects the Operations of a National Industry.

The nature of the petroleum industry reflects the close economic interrelationship of its operations. The operations of independent refiners illustrate the relationships between refining and marketing and between marketing at wholesale and at retail. The operations of the industry are national in scope, *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319 (1851), and, indeed, are a topic of heated and continuing debate on the national level.

Appellants are not contending that the states are barred from enacting any laws regulating the petroleum

industry.[20] However, Paragraphs (B) and (C), which meddle with this interstate industry, reflect local intrusion into matters which are of national concern. Because of the interstate nature of the industry, such a law inevitably interferes with the free flow of commerce among the States, as the record here amply demonstrates.

In the light of these considerations, the Maryland Act cannot properly be said to involve the mere "preservation of the state's power over its internal affairs," or interests "peculiarly local." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 534; *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting with the concurrence of Holmes, J. and Brandeis, J.).

The consequences of a decision upholding the Maryland statute would extend far beyond Maryland. Since the Act was adopted in Maryland in 1974, there has been a nationwide movement spearheaded by dealer associations to enact similar laws in other states. During the last four years, proposals to prohibit or limit company operation of service stations have been before the legislatures of 36 jurisdictions,[21] four of which have adopted them.[22]

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[20] *See, e.g.*, Motor Fuel Inspection Law, Md. Anno. Code, Art. 56, § 157A *et seq.*; Maryland Gasoline Products Marketing Act, Md. Anno. Code, Comm. L. Art. § 11-301 *et seq.* The latter is found at J.A. 155a.

[21] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Vermont, Washington, and West Virginia.

[22] In addition to Maryland, the state legislatures of Florida and Delaware and the Council of the District of Columbia have adopted laws containing restrictions on refiner operation of service stations. The Florida law (Fla. Stat. § 526.151), which limits producer or refiner company operations to 3 percent of the total number of

The prospect that various legislatures may adopt their own versions of the Maryland law has serious implications for any company's national marketing operations. A recent Report of the House Committee on Interstate and Foreign Commerce noted that numerous states have initiated disparate legislative actions to address petroleum product franchising problems and that they have resulted in "an uneven patchwork of rules governing franchise relationships which differ from State to State." H. R. Rep. No. 94-1615, 94th Cong., 2d Sess. 17 (1976). *See also Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959); *Morgan* v. *Virginia*, 328 U.S. 373, 381-82 (1946).

The record in this case demonstrates that prohibiting refiners from operating stations in Maryland will bar out-of-state competitors and eliminate independent refiners from the Maryland market. If other states adopt similar laws, the cumulative effect upon many refiners marketing in interstate commerce could be disastrous, and would at least seriously interfere with the operations of an interstate industry. (A. 504-06, 509). *See Nippert* v. *Richmond*, 327 U.S. at 430.

This case thus presents a state law which favors local merchants over interstate competitors and places economic impediments in the way of the free flow of commerce. These factors separately and in combination demonstrate that the Maryland Act should not be allowed to stand.

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stations in the state, was declared unconstitutional by a state trial court in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Fla. Jan. 23, 1975); no appeal was taken. The Delaware statute (Del. Code, Tit. 6, §§ 2905-2906 (1976 Cum. Supp.)), which precludes the opening of gasoline stations operated by manufacturers of petroleum products, was upheld on a motion for partial summary judgment by the trial court which relied upon the opinion of the Maryland Court of Appeals. *Atlantic Richfield Co.* v. *Tribbitt*, C. A. Nos. 4692, 4774 (Del. Ch., New Castle County, Aug. 25, 1977).

D. The Burdens Which Paragraphs (B) and (C) of the Maryland Act Impose on Interstate Commerce are Not Justified by Benefits to Legitimate Local Interests Incapable of Being Achieved by Less Drastic Means.

Where a state law discriminates against interstate commerce rather than regulating interstate and local commerce evenhandedly, the state has the burden of showing both that important local interests are being protected and that non-discriminatory alternatives are unavailable. However, regardless of whether a statute is discriminatory or merely burdensome to interstate commerce, this Court determines "the extent of the burden that will be tolerated" by balancing that burden against "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 371.

In order to justify the discriminatory and burdensome effects of the Maryland Act upon interstate commerce, there must be both (1) a legitimate local interest and (2) a local benefit which (a) is substantial enough to outweigh the detriments to commerce, and (b) is not obtainable by means having a lesser impact on interstate activity.

The rational basis test invoked in dealing with state economic legislation challenged under the Due Process and Equal Protection clauses is not controlling. "Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated. . . ." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 304 n.5 (1976); *Bibb* v. *Navajo Freight Lines*, 359 U.S. at 529. "[T]he court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated

by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945). The national interest in the free flow of commerce cannot be safeguarded if the locally motivated judgments of a state legislature or court are accorded binding weight.

1. *The need for a legitimate local interest.*

A principal objective of the Act was to protect local dealers against competition from refiners, all of which were located outside of Maryland. The trial court found that the statute was "designed to benefit one class of merchants to the detriment of another" and that it "would primarily serve to protect the independent dealers rather than the public at large." (J.A. 130a-31a). The State's answers to the complaints declared that the Act was designed to promote "the economic welfare and continuing existence of the retail service station dealers." (A. 29, 51, 77, 104, 128, 145). This Court has stated that the "protection of local economic interests" does not justify interference with interstate trade. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 531.

Moreover, where a state law such as the Maryland Act involves matters purely economic in nature, rather than those such as public health, safety, or consumer fraud, this Court has indicated less willingness to tolerate burdens imposed by the law on interstate commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 143; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. at 531. The most obvious local economic interest underlying Paragraphs (B) and (C) cannot be regarded as a legitimate basis for interfering with or burdening the flow of interstate commerce.

2. *The benefit to other alleged local interests is slight and obtainable by the use of less burdensome alternatives.*

The court below relied on two other local interests to justify the Act: (a) the necessity of preventing unfair allocation of motor fuel in time of shortage; and (b) preserving competition and preventing monopolistic control of gasoline marketing by a few large oil companies. (J.A. 14a-15a, 19a). These considerations, by themselves, are, of course, legitimate legislative objectives. However, the record in this case demonstrates that there was no substantial need for the Legislature to take these measures in order to attain these objectives; and, in addition, adequate and much less burdensome non-discriminatory alternatives were available.

(a) *Fair allocation in time of shortage.*

During the gasoline shortage in 1973, there were complaints from dealers that some suppliers gave preferential treatment in allotting motor fuel to service stations they themselves operated. Even assuming there were some instances of unfair allocation during that period, this in no way justifies an absolute prohibition on all refiner-operated service stations.

First, companies such as appellants Ashland, Commonwealth and Kayo have always used only company-operated stations in Maryland. Since they do not market through independent dealers, it is apparent they could not have discriminated against them. To force such companies out of business because of some other companies' failures to allocate fairly can have no rational basis.[23]

[23] The "evidence" of discrimination is meager at best. The "surveys" conducted by the Maryland Comptroller's office were rank hearsay and admitted not for the truth of what was contained therein, but rather to show what was before the Legislature. (A. 548-50). The evidence actually established that Exxon's allocation program,

Second, the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (Supp. 1975), and regulations promulgated thereunder (10 C.F.R. Parts 210-211 (1977)), establish a detailed system for allocating petroleum products. That Act was carefully designed by Congress to meet the problems which arose during the shortage and thereafter.[24] Also, Paragraph (F) of the Maryland Act provides for uniform and equitable allocations in "periods of shortage." The court below construed those standards as having the same meaning as the federal Act. (J.A. 29a, 32a). After the federal mandatory allocation regulations became effective in January 1974, the record disclosed no evidence of any unfair allocation by any supplier.

For a state to deal with the matter of allocation during periods of shortage by an absolute prohibition of all refiner-operated service stations is a flagrant example of unnecessary legislative overkill. Plainly the local interest sought to be protected can be "promoted as well"—and indeed much more effectively—by means having a "lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 371.

(b) *The preservation of competition.*

The Maryland Court of Appeals stated that the Maryland Legislature could have found "that the recent trend of increased direct operation of service stations by producers and refiners, if allowed to continue, could substantially decrease competition and lead to the control of [the] market by a few major oil companies." (J.A. 19a).

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as well as Getty Oil Company's, was fair and equitable. (A. 556-57, 563-64). With respect to other parties, there simply was no evidence one way or the other.

[24] The Energy Policy and Conservation Act, § 461, 89 Stat. 955 (1975), 15 U.S.C. § 760g (Supp. 1975), has extended the operation of the Act through September 30, 1981.

In considering the need for a total ban on company-operated stations these uncontroverted facts must be kept in mind: (1) in 1974 major oil companies operated 124 out of 3,800 service stations in Maryland;[25] and (2) the trial court found, the State conceded and the Court of Appeals recognized that the existing market was "highly competitive." The trial court found that the Act, in fact, was anti-competitive and inversely related to the public welfare. (J.A. 132a).

Although the expert witnesses differed as to the long run benefit to competition (J.A. 6a-7a), what cannot be disputed is that there will be a definite, direct and immediate diminution, if not elimination, of competition from low-price stations operated by out-of-state refiners. The uncontradicted evidence is that the benefit to competition, if any, will be "so slight or problematical as not to outweigh the national interest" in keeping interstate commerce free from interferences which would seriously impede it. *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 776.

Moreover, even less weight should be given to this alleged local interest, where, as here, the same public interest can be safeguarded adequately by measures much less drastic than prohibiting all refiner-operated service stations, including those operated before the law was passed. "Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any ''realistic' judgment'

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[25] Forty-two of these 124 stations operated by major oil companies were those which BP Oil Corporation ("BP") had converted to low price, limited service, company-operation after having lost $150 million in its dealer marketing program during the few years prior to 1974. BP determined that it could survive as a marketer only by adopting this marketing approach. (J.A. 131a; A. 770, 773-74); *See Call Carl, Inc.* v. *BP Oil Corp.*, 554 F.2d 623 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3293 (U.S. Oct. 31, 1977).

whether a given state action 'unreasonably' trespasses upon national interests must, of course, consider the 'consequences to the state if its action were disallowed.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 373. The Maryland Court of Appeals completely ignored the existence of less burdensome alternative means of accomplishing the State's objectives.

There are equally effective and much less drastic means of halting any perceived trend toward the conversion of dealer-operated stations to company operations. Maryland has already adopted legislation prohibiting arbitrary terminations of dealer-operations. Maryland Gasoline Products Marketing Act. Md. Anno. Code (1975), Comm. Law Art. § 11-304(g). (J.A. 158a). Insofar as anti-competitive consequences may *in the future* result from the presence of company-operated stations, Maryland law parallels the federal antitrust laws; both proscribe retail price maintenance schemes, price discrimination and predatory pricing which affect competition. *Cf.* Maryland Antitrust Act, Md. Anno. Code (1975), Comm. Law Art. § 11-201 *et seq.;* Maryland Unfair Sales Act, Md. Anno. Code (1975), Comm. Law Art. § 11-401 *et seq.* Section 7 of the Clayton Act prohibits a corporation from acquiring the stock or assets of another corporation where the effect may be to lessen competition. The federal antitrust laws were recently amended to permit the Attorney General of any state to bring a *parens patriae* suit on behalf of the residents of the state for violations of the Sherman Act. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394 (1976). *See also Burch* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977).

In addition, Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, has recently been applied to alleged unfair provisions in retail service station leasing transactions. *Standard Oil Co. (Ohio)* Dkt. No. 8910, CCH Trade Reg. Rep., ¶ 21,329 (Consent Order, July 14,

1977); *Phillips Petroleum Co.*, 84 F.T.C. 1666 (1974) (consent order for settlement purposes only with no admission or finding of violation). Congress recently granted the Commission increased enforcement power to deal with unfair and deceptive acts. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2200 (1975), 15 U.S.C. § 45(m)(1)(B) (Supp. 1975).

These statutes provide remedies for coping with any actions taken by producers or refiners which may substantially lessen competition or tend to create monopoly. A law which bars from the retail market all companies which produce or refine petroleum products, large or small, innocent or guilty of anti-competitive conduct, even though their activities intensify competition rather than the contrary, cannot be said to be necessary to preserve competition.

In sum, there are existing state and federal statutes to deal with each of the specific unfair or anti-competitive practices that the Legislature may have sought to control. The possibility that at some time in the future the consequences which Maryland fears will occur is not substantial, in view of the less drastic available alternative means of obtaining the same results, to outweigh the immediate impairment of interstate competition and the interference with the interstate market which will flow from the enforcement of the Maryland law if it is allowed to stand.

II. PARAGRAPH (D) OF THE MARYLAND ACT IS INVALID UNDER THE SUPREMACY CLAUSE.

A. Under the Supremacy Clause a State Statute Impermissibly Conflicts With a Federal Statute Where (1) Compliance With the State Statute Necessitates a Violation of the Federal Statute or (2) the State Statute Otherwise Interferes With the Purposes and Objectives of the Federal Statute.

The Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts with any federal law or treaty. *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *De Canas* v. *Bica*, 424 U.S. 351, 357 n.5, 359 n.7 (1976); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). Under the "burdens or conflicts" application of the Supremacy Clause, a state statute is unconstitutional if it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting a federal statute. *De Canas* v. *Bica*, 424 U.S. at 363, *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *See also Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

A state statute is an unmistakable obstacle where compliance with its terms would necessitate a violation of a federal statute. As this Court stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-43, "a holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."

Where compliance with both a federal and state statute is technically possible, the state statute is invalid where it operates to frustrate the full effectiveness of the federal statute or sets to naught a federal policy. As the Court held in *Perez* v. *Campbell*, 402 U.S. at 652, "the

controlling principle [is] that *any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.* (Emphasis supplied). This rule was stated by the Court in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964), as follows: "When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that *the federal policy 'may not be set at naught, or its benefits denied' by the state law.*" In essence, any state law "which interferes with or is contrary to federal law, must yield." *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

These basic constitutional principles have been recently applied in *Jones* v. *Rath Packing Co.*, where this Court reaffirmed that a state law is void if it would be impossible "to comply with the state law without triggering federal enforcement action." (430 U.S. at 540). The Court's opinion also shows that even in the absence of such clear conflict, a state statute is void under the Supremacy Clause if an analysis of the state statute reveals that its operation would in any way interfere with or obstruct the full and complete effectiveness of a Congressional purpose.

In this case appellants do not maintain that by enacting the Robinson-Patman Act Congress intended to "occupy the field" to the exclusion of all state regulation of price discrimination. Appellants do contend, however, that Paragraph (D) is in direct, actual, irreconcilable conflict with the Robinson-Patman Act. This conflict is twofold.

First, Paragraph (D) of the Maryland Act is inconsistent with and frustrates the full effectiveness of the Congressional purposes underlying Sections 2(a) and 2(b) of the Robinson-Patman Act. Section 2(a) of the Robinson-Patman Act proscribes only those price differentials which adversely affect competition and Section 2(b) authorizes price differentials necessary to meet the

equally low price of a competitor. In contrast, Paragraph (D) of the Maryland Act proscribes all non-uniform allowances (discounts) by producers, refiners or wholesalers of petroleum products within the State of Maryland even though they satisfy either or both of the exceptions to the federal statutory prohibition. By ignoring these two federal exceptions, Paragraph (D) frustrates the Congressional accommodation between the overall Sherman Act policy of promoting and indeed requiring competitive pricing practices and the Robinson-Patman Act policy of eliminating anti-competitive price discriminations.

Second, compliance with Paragraph (D) of the Maryland Act would expose a supplier to potential liability under the Robinson-Patman Act. Paragraph (D) requires that voluntary allowances, if granted, be made on a statewide basis, whereas Section 2(b) of the Robinson-Patman Act limits the use of the meeting competition defense to an individual competitive situation. Conformity with Paragraph (D) and the consequent spread of the geographical area covered by a voluntary allowance would thus create price differentials which could cause competitive injury that could not be justified under Section 2(b).

B. The Scope of the Robinson-Patman Act's Section 2(b) Meeting the Equally Low Price of a Competitor Defense.

Paragraph (D) imposes severe limitations upon a seller's use of the Section 2(b) defense. These limitations impose an impossible dilemma upon a supplier in Maryland and effectively frustrate the Congressional purposes and objectives underlying the meeting equally low price of a competitor defense. The conflict between Paragraph (D) and the Robinson-Patman Act thus turns, in part, on the scope and nature of Section 2(b) as developed by this Court.

1. *The Section 2(b) defense is absolute.*

The *Standard Oil* litigation between the Federal Trade Commission (hereinafter Commission or FTC) and Standard Oil Company (Indiana) is the leading authority on the rights bestowed by Section 2(b). In that case Standard proved that the lower, discriminatory prices which it granted to its customers were made in good faith to meet the equally low price of a competing supplier. Nevertheless, the Commission held that Section 2(b) was not a complete defense to such price discrimination where there was proof that the price reductions caused competitive harm. *In re Standard Oil Co.*, 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946). This ruling was affirmed by the Court of Appeals. *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949). This Court reversed. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

Before this Court the Commission argued that Section 2(b) did not provide a defense where the harm to competition at the customer level outweighed the benefit to competition at the seller's level that flowed from the seller's ability to meet the equally low price of its competitor. The Court rejected this balancing test and held that Section 2(b) provided a complete and absolute defense to the seller notwithstanding the incidence of injury caused to customer level competition. The Court stated that "the proviso is readily understandable as simply continuing in effect a defense which is equally absolute, but more limited in scope than that which existed under § 2 of the original Clayton Act." (*Id.* at 250-51). The Court further stressed the "effectiveness and value" (*id.* at 247) of the Section 2(b) defense, stating:

> The amended Act now safeguards the *right* of a seller to discriminate in price in good faith to meet an equally low price of a competitor, but he has the burden of proof on that question. *This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission* . . . . (*Id.* at

247 n.12, *quoting* Senate Select Temporary National Economic Committee, 76th Cong., 3d Sess., Investigation of Concentration of Economic Power, Monograph No. 42, *The Basing Point Problem* 139 (Comm. Print 1941)).

Upon remand, the FTC again denied Standard the benefits mandated by Congress in Section 2(b). *In re Standard Oil Co.*, 49 F.T.C. 923 (1953). The Court of Appeals reversed the Commission's order, *Standard Oil Co.* v. *FTC*, 233 F.2d 649 (7th Cir. 1956), and this Court affirmed, *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958).

Since the *Standard Oil* litigation, this Court and the lower federal courts have adhered to the rule that a seller has an absolute right of self-defense under Section 2(b) to meet the equally low price of a competitor regardless of competitive impact.[26] As the Court stated in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963), Section 2(b) "has been interpreted to afford an *absolute defense* to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect." (Emphasis supplied).

2. *A price reduction must be tailored to an individual competitive situation.*

The scope of Section 2(b) was established by this Court in *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746

[26] *See, e.g., FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F.2d 694, 704 (9th Cir. 1964); *Jones* v. *Borden Co.*, 430 F.2d 568, 572 (5th Cir. 1970); *Hanson* v. *Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

The Section 2(b) defense is not only absolute where a seller reduces a price to *retain* its then-existing customers, but also where necessary to meet competition for *new* customers. *Cadigan* v. *Texaco Inc.*, 492 F.2d 383, 387 (9th Cir. 1974); *Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962).

(1945). Speaking to the use of Section 2(b) to justify a price system, the Court explained:

> But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' *The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.* (*Id.* at 753; emphasis supplied).

The legislative history of Section 2(b) is in accord. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936) ("the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further"). Since *Staley* the courts have uniformly held that the absolute protection afforded by Section 2(b) encompasses *only* those discriminatory price reductions which are tailored to meet a particular competitive situation.[27]

[27] *See FTC* v. *National Lead*, 352 U.S. 419, 431 (1957) ("[t]he section is designed to protect competitors in *individual transactions*"; emphasis supplied); *FTC* v. *Cement Institute*, 333 U.S. 683, 725 (1948) ("'[t]he Act . . . places emphasis on *individual competitive situations*, rather than upon a general, system of competition'", *quoting FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. at 753; emphasis supplied); *Surprise Brassiere Co.* v. *FTC*, 406 F.2d 711, 714-15 (5th Cir. 1969); *Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F.2d 97, 107-08 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F.2d 694, 706 (9th Cir. 1964); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F.2d 492, 493 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966). *See generally* Kuenzel & Schiffres, *Making Sense of Robinson-Patman; The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1244 (1976); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 249 (1962); *Report of the Attorney General's National Committee to Study the Antitrust Laws* 184 (1955).

3. *A Seller may only meet competition at the same functional level.*

A seller may only utilize the defense to meet the lower price of its *own* competitor and may not lower its price merely to aid its customer to meet a lower price of the *customer's* competitor. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 514; *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-98 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). This was explored at length in *Sun*, the case which frames the Robinson-Patman issues presented by appellants.

Sun was an integrated refiner and marketer of gasoline that distributed gasoline through independent retail service station operators. Super Test, a retail service station chain, opened a station across the street from a Sun dealer, McLean, and undersold him. To help McLean meet that price competition, Sun lowered its gasoline price to him but refused to grant similar allowances to other Sun dealers in the area. The FTC issued a complaint against Sun, charging price discrimination in violation of Section 2(a) of the Robinson-Patman Act. In defense, Sun invoked the "meeting the equally low price of a competitor" defense of Section 2(b) of the Act. The Commission found that Sun had not attempted to meet a price cut originated by its own competition—another wholesale supplier; Sun had granted an allowance to one of its dealers to help him meet a price cut made by the dealer's competitor—a competing service station. Consequently, the Commission rejected Sun's use of Section 2(b) "because Sun was not meeting its own competition." (371 U.S. at 510).

In affirming the Commission, this Court noted that "[t]he only issue thus before the Court is whether Sun is here entitled to avail itself of the § 2(b) defense that its . . . 'lower price' to McLean was extended 'in good faith to meet an equally low price of a competitor.'" (*Id.* at 511). In resolving that issue, the Court disregarded as

not founded on evidence of record the court of appeals' assumption that Super Test was an integrated supplier-retailer of gasoline and proceeded "on the assumption that Super Test was engaged solely in retail operations . . . [and that] Super Test was not the beneficiary of any enabling price cut from its own supplier." (*Id.* at 512). The Court thus addressed a set of facts in which Sun had lowered its price to a customer *not* to meet the lower price offered by a *competitor of Sun*, but to allow Sun's customer (McLean) to compete with his competitor, *i.e.*, the Super Test station across the street. In that situation, the Court held that Sun's price reduction could not be justified under Section 2(b) because "the § 2(b) phrase 'equally low price of a competitor' would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut." (*Id.* at 514).

The question unanswered directly by *Sun* is whether Section 2(b) encompasses a situation where a supplier such as Sun lowers its price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer which lower price is subsidized by a price reduction from that dealer's supplier, a competitor of Sun. Indeed, *Sun* specifically reserved this question, stating:

> Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier —presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion. (*Id.* at 512 n.7).

At a later point in the opinion, the Court again stated:

> In this posture of the case, we find it unnecessary to pass upon the Commission's apparently alternative theory that a lower competitive offer to McLean him-

self was a prerequisite to Sun's invocation of the § 2(b) defense. (*Id.* at 529 n.19).

Following this Court's remand of *Sun* to the Court of Appeals for the Fifth Circuit, that court remanded the case to the Commission to determine whether Super Test's lower price was in fact subsidized by its supplier. *In re Sun Oil Co.*, 67 F.T.C. 341 (1965). While the issue was pending before the Commission, the proceeding was dismissed *sua sponte*. (*Id.* at 367). It is the precise question reserved in *Sun* which was explicitly decided by the Maryland Court of Appeals and which is squarely presented for decision.

C. Properly Construed Section 2(b) Furnishes a Defense to a Seller in Granting Voluntary Competitive Allowances.

In deciding the issue left unresolved in *Sun*, the Maryland court first construed the term "voluntary allowance" in Paragraph (D) to mean "temporary price reductions to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." [28] (J.A. 35a). Turning to Section 2(b) of the Robinson-Patman Act, the Maryland court ruled that the Section 2(b) defense did not encompass the granting of voluntary allowances. Relying on *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), and rejecting the Seventh Circuit's holding in *Bargain Car Wash* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), and other federal authority,[29] the court construed

[28] It is undisputed that sales of gasoline to dealers in Maryland are in the flow of interstate commerce, thus subjecting appellants to the requirements of the Robinson-Patman Act. *See Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974).

[29] *See* discussion at 66-70, *infra*.

Section 2(b) as available "only where the discriminatory price reduction is to meet the equally low price offered to *the same buyer* by a competing seller." [30] (J.A. 39a-40a; emphasis the court's). The court concluded that the above constructions of the voluntary allowance provision of Paragraph (D) and the scope of the "meeting competition defense" of Section 2(b) eliminated any possible conflict between the two statutes:

> [W]e have construed "voluntary allowances" in the state Act to mean only those price reductions offered to retail dealers to enable the dealer to meet the lower price of a *competing retail dealer*. Thus, there is no conflict between Paragraph D and § 2(b) of the Clayton Act as amended by the Robinson-Patman Act. Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer to meet the lower price of a *competing dealer*, and, in our view, § 2(b) of the federal Act does not extend to that situation. (J.A. 40a; emphasis the court's).

Stated simply, the Maryland court's holding that Section 2(b) does not furnish a defense to a supplier that grants "voluntary allowances" to its retail service station dealers in response to price reductions granted by a competing supplier to that competing supplier's retail dealers interferes with the purposes and objectives of the Robinson-Patman Act and is contrary to all federal court authority and the stated official policy of the Federal Trade Commission, the United States Department of Justice and the Federal Energy Administration.

The legislative purposes embodied in the Robinson-Patman Act strongly mandate that Section 2(b) encom-

[30] As discussed *infra* at 70, the Maryland court's reliance on *Enterprise* is misplaced.

pass voluntary competitive allowances.[31] The most fundamental of such purposes is that Section 2(b) be interpreted in light of the realities of competition and the marketplace so as to preserve competitive equities. Encompassed within this Court's statement that "[c]onsiderations of fairness and convenience . . . must . . . have been controlling in the drafting of Section 2(b)," *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 78 (1953), is the recognition that competition on each functional level should be left unimpaired. As this Court stated in *Sun*, in enacting the Robinson-Patman Act "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." (371 U.S. at 520). *See also FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

In the petroleum industry, suppliers generally market through retail service stations displaying the supplier's brand name and operated by dealers as independent businessmen.[32] Intense *interbrand* competition exists between the brand name gasoline of suppliers. (A. 473).[33] Such interbrand competition means that if a supplier were to be precluded from granting voluntary competitive allowances in response to a competing supplier's price cut, the supplier's dealers would quickly lose sales to competing

[31] The legislative history of the Robinson-Patman Act shows that Congress understood that it is a competitive necessity for a seller to have the right to meet local competition. *See* discussion at 88-94, *infra*.

[32] While suppliers may not normally compete for sales to the same branded service station dealer, such dealers are completely free to switch suppliers and have in the past. *See, e.g., Krieger* v. *Texaco Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973). In any case, suppliers are in competition, as recognized by the Federal Trade Commission in its *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967). *See* discussion at 69, *infra*.

[33] *See also* cases and authorities discussed at 65-70, *infra*.

retailers who were the beneficiaries of the price cut; as the dealers sold less gasoline, the supplier would sell less gasoline to its dealers. In due course, the supplier's dealers would go out of business, thereby eliminating the supplier from the local market. *See In re Sun Oil Co.*, 67 F.T.C. at 366 (Reilly, Commissioner, concurring). In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S. Ct. 2549, 2559 n.19 (1977), this Court recognized the importance of preserving such interbrand competition between manufacturers, stating that "[i]nterbrand competition . . . *is the primary concern of antitrust law*." (Emphasis supplied).

Additionally, it is both unrealistic and unfair to expect an unsupported dealer to meet the lower price of a competing retail dealer supported by its supplier. Such an unsupported dealer cannot be said to start out on "equal competitive footing." (*FTC* v. *Sun Oil Co.*, 371 U.S. at 520). Just as it would distort "competitive equities" (*id.* at 523), to permit a supplier to aid a dealer in meeting that dealer's competition, it would be disruptive of "competitive equities" to *preclude* a supplier from aiding its dealer when that dealer faces price competition not from another dealer but from that dealer's supplier. This would be especially true in areas such as Maryland where retail petroleum marketing is "a highly competitive industry." (J.A. 99a). As this Court stated in *Sun*:

> Restriction of the [§ 2(b)] defense to those situations in which a supplier responds to the price concessions of its own competitor—another supplier—maintains general competitive equities. *Fairness demands neither more nor less.* (371 U.S. at 522-23; emphasis supplied).

In accordance with these basic considerations of fairness and competitive equity, all federal authority has rejected the Maryland court's narrow reading of the scope

of the Section 2(b) defense and construed Section 2(b) as encompassing voluntary allowances granted by a supplier in response to competitive pressures levied by competing suppliers. Of the federal court authority, the decision of the Seventh Circuit in *Bargain Car Wash* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), most closely examines the issue reserved in *Sun* and decided by the Maryland court. Upon finding that discriminatory granting of competitive allowances resulted in violation of Section 2(a) of the Robinson-Patman Act (*id.* at 1175), the court of appeals turned to the trial court's holding and defendant American's contention that the price allowances were made to meet a competitor's lower price. Noting that availability of the Section 2(b) defense required an answer to the question reserved in *Sun* (*id.*), the court, in an opinion by Mr. Justice Clark, sitting by designation, and concurred in by Mr. Justice Stevens, sitting then as circuit judge, and Chief Judge Swygert, held that "the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer." (*Id.*).

Similarly, in *Bunty* v. *Shell Oil Co.*, 1972 CCH Trade Cas. ¶ 74,252 (D. Nev. 1972), a Shell retail service station dealer alleged, *inter alia*, that Shell had violated Section 2(a) of the Robinson-Patman Act in granting competitive allowances to dealers located in an adjoining trade area but not extending such allowances to the trade area in which plaintiff was located. The district court found that the allowances were "granted to meet the price which suppliers were offering competitive dealers in the area." (*Id.* at 93,187). The court then held that "[a]ny price discrimination which affected plaintiff was the result of Shell's good faith meeting of the prices afforded competitive dealers by competitors of Shell." (*Id.* at 93,189).

In *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965), Continental raised the Section 2(b) meeting competition defense and caused issuance of subpoenas *duces tecum* on plaintiffs and third party gasoline marketers to obtain supporting information. The district court denied plaintiffs' motions to quash the subpoenas and the Tenth Circuit affirmed. Focusing on plaintiffs' contention that the information sought by Continental was irrelevant because the meeting competition defense was not available under this Court's decision in *Sun*, the court of appeals rejected plaintiffs' construction of Section 2(b) and distinguished *Sun* on the ground that as supplier-retailers, plaintiffs were "'substantial competitors'" (*id.* at 997) of Continental and that Continental had submitted proof that "*most independent service stations, including those supplied or operated by appellants, were being charged less for gasoline than Continental was charging its dealers.*" (*Id.*; emphasis supplied.) The court held that on these facts Section 2(b) was available to Continental:

> The showing of Continental is of competition in the area of the charges made in the complaint and of operations at the same functional level. In these circumstances the good faith meeting competition defense is available under § 2(b) of the Robinson-Patman Act. (*Id.* at 998).

The availability of the meeting competition defense in granting voluntary competitive allowances has also been implicitly recognized in *Belliston* v. *Texaco Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and in *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). In each case the court upheld the exchange of wholesale price information as essential to maintaining the Section 2(b) defense (as construed in *Sun*), where the companies were able to demonstrate that the exchanges were efforts to obtain verifica-

tions of competing suppliers' wholesale price reductions prior to granting voluntary competitive allowances. As stated in *Belliston*: [34]

> *When a [price] war started, it was necessary for the supplier of the retail outlets to grant allowances to their outlets so that they could lower their prices in order to remain competitive.* When Texaco heard from one of its Dealers that a competitor had lowered its prices, Texaco endeavored to verify the information. . . . *This much would be necessary before Texaco could lower its prices and still be within the "meeting competition" defense.* (455 F.2d at 182; emphasis supplied).

In addition to federal court authority, both the FTC and the Department of Justice have concluded that Section 2(b) encompasses the granting of voluntary competitive allowances. Since the Clayton Act charges both agencies with the enforcement of the Robinson-Patman Act,[35] their interpretation of Section 2(b) must weigh heavily in its construction. As this Court stated in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969), "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *See also Youakim* v. *Miller*, 425 U.S. 231, 235-36 (1976).

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[34] The Tenth Circuit's ruling in *Belliston* is a holding that Section 2(b) was available to Texaco in granting voluntary allowances since the court could not hear the issue of price exchanges without resolving the question of whether Section 2(b) furnished a justification for such exchanges. While the Ninth Circuit's opinion in *Gray* on the Section 2(b) question is less explicit, the court reasoned that it was Section 2(b) that furnished sufficient basis for the jury to conclude that Shell's verification efforts were "made in connection with a plausible belief that it was conforming to its legal obligations." (469 F.2d at 747).

[35] Section 11(a), 15 U.S.C. § 21(a) (1970) (Federal Trade Commission); Section 15, 15 U.S.C. § 25 (1970) (Department of Justice).

In 1967, after conducting extensive hearings,[36] the FTC issued a comprehensive *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967) (hereinafter "Report"). This Report represents "the Commission's guidelines and enforcement policy with respect to the gasoline marketing industry" (Report at 2) and specifically concludes that Section 2(b) furnishes a defense to sellers when granting voluntary allowances:

> The nature of the distribution system in the petroleum industry is such that suppliers of gasoline normally do not compete with one another on sales to the same dealer. That they are in competition with one another, however, is an undeniable fact. In the actualities of competition in the marketing of gasoline, it is only by reducing its wholesale price that the supplier can respond defensively to another supplier's price cut which is reflected in the retail price at which that supplier's gasoline is sold. . . . Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer. (Report at 61; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,245).

The Department of Justice in its recent *Report On The Robinson-Patman Act*, 93-97 (1977), and the Federal Energy Administration Pricing Regulations, 40 Fed. Reg.

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[36] The hearings consist of 1,751 pages of testimony encompassing virtually all information relevant to the question. (FTC, Public Hearings Relating to Marketing of Automotive Gasoline (May 3-6, 10-12, 20, 1965) (unpublished transcript in FTC library)). Indeed, it would appear that the Commission dismissed *sua sponte* the *Sun* case on remand and closed other pending matters for the very purpose of conducting these public hearings and, *inter alia*, reaching a resolution of the question reserved by this Court in *Sun*. *See* Report at 2; *In re Sun Oil Co.*, 67 F.T.C. at 366 (Reilly, Commissioner, concurring)

10655, 10658 (March 7, 1975), similarly concluded that the Section 2(b) defense is available to a supplier in the circumstances left unresolved by this Court in *Sun*.

In short, all federal authority to consider the question has concluded that Section 2(b) furnishes a defense to a seller in granting voluntary competitive allowances. In this respect, the Maryland court's reliance on the district court's opinion in *Enterprise Industries* v. *Texas Co.*, is misplaced. The district court in *Enterprise* held that Section 2(b) does not permit a seller to discriminate in price in order "to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitor." (136 F. Supp. at 421; emphasis in original). Although the precise factual situation involved in *Enterprise* is unclear, the district court apparently was faced with a situation where the lower price of the competing retail dealer was unsupported by a price cut by the dealers' supplier—precisely the situation assumed by the Court in *Sun*. The district court's decision was so construed in *Sun* where this Court noted that "[t]he precise question has not heretofore been resolved by this Court. The only reported judicial decision (other than that of the Court of Appeals in this case) considering the issue is a District Court opinion supporting the view of the Commission [citing *Enterprise*]." (371 U.S. at 512). It is thus clear that the district court's ruling in *Enterprise* is limited to the "precise" issue resolved in *Sun*.

As interpreted by this Court, Section 2(a) prohibits price discrimination whenever it may substantially lessen competition. *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969). Correlatively, Section 2(b) places the emphasis on competition. The relevant inquiry thus should not be into the identity of the purchaser; rather, it should be into whether the supplier is facing competition from its competitor, the meeting of which necessitates a price

reduction to its corresponding purchaser. This conforms with the express terms of Section 2(b) which provide that if a seller is meeting the equally low price of a competitor, it may lower its price to "*any* purchaser or purchasers." (15 U.S.C. § 13(b); emphasis supplied). *See Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962). To construe Section 2(b), as did the Maryland court, to encompass sales only to the same customers is unfair to sellers (and their purchasers) that confront the reality of marketplace competition. The lower court's construction of Section 2(b) engrafts an artificial limitation on the scope of the Section 2(b) defense that would severely restrict competition and nullify the Congressional purpose underlying the Robinson-Patman Act of ensuring that competitors start on equal competitive footing.

D. Compliance With Paragraph (D) Exposes a Seller to Potential Primary-Line and Secondary-Line Liability Under Section 2(a) of the Robinson-Patman Act.

1. *Compliance with Paragraph (D) exposes a seller to potential primary-line liability under Section 2(a) of the Robinson-Patman Act.*

Under Section 2(a) of the Robinson-Patman Act, a seller that discriminates in price is liable in treble damages for competitive injury thereby proximately caused to the seller's own competitors (primary-line injury). Compliance with Paragraph (D) exposes suppliers in Maryland to unavoidable potential primary-line liability. The elements of such primary-line liability are discussed in this Court's opinions in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967) and *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

In *Anheuser-Busch*, the Court held that "it is certain at least that § 2(a) is violated where there is a price dis-

crimination which deals the requisite injury to primary-line competition, even though secondary-line and tertiary-line competition are unaffected." (363 U.S. at 542-43). The Court explicitly rejected the argument that to find price discrimination at the primary-line, there had to be " 'proof that the lower price is below cost or unreasonably low for the purpose or design to eliminate competition and thereby obtain a monopoly.' " (*Id.* at 546). The Court stated simply that "there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' *Rather, a price discrimination within the meaning of that provision is merely a price difference.*" (*Id.* at 549; emphasis supplied).

Anheuser-Busch makes clear that under Section 2(a) of the Robinson-Patman Act, a *prima facie* primary-line case is presented where the Seller charges prices in one area which are different than the prices the seller charges in another area (territorial price discrimination) and such price differences result in the requisite injury to competition. (*Id.* at 550). As stated in *Sun*, "a 'discrimination' under § 2(a) of the Act comprehends a 'difference in price' among even non-competing purchasers, the legality or illegality of which depends upon whether or not there is likely to be substantial injury to competition among sellers." (371 U.S. at 527 n.16). *See also Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. at 702.

The standard for primary-line competitive injury in territorial price discrimination cases has most recently been reviewed in *Utah Pie*, where this Court explained that a jury could find the requisite injury to competition if a seller's "continued or sporadic" territorial price discrimination "erodes competition" or results in "a drastically declining price structure." (386 U.S. at 703). As the Court explained further, "[t]he statutory test is one that necessarily looks forward on the basis of proven conduct in the past." (*Id.*). *See National Dairy Products Corp.* v. *FTC*, 412 F.2d 605, 614-17 (7th Cir. 1969).

Under *Anheuser-Busch* and *Utah Pie*, territorial price differences may give rise to a likelihood of "substantial injury to competition among sellers" (*FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.16) and consequent liability under Section 2(a).[37] In granting competitive allowances to dealers adversely affected by a competing supplier's price cut, appellants create territorial price differences between the lower prices charged to the adversely affected dealers and the higher prices charged to other dealers. While such territorial price differences are primary-line violations of Section 2(a) if they result in the requisite injury to competition, unanimous federal authority has held that Section 2(b) furnishes an absolute defense to any *prima facie* Section 2(a) violation which may result from the granting of voluntary competitive allowances. However, to be entitled to the defense, appellants are required under *Staley* to limit the amount and geographic scope of allowances to the amount and geographic scope of the competing supplier's price cut.

In stark contrast to the limited nature of the competitive allowances granted by appellants, Paragraph (D) provides that if a competitive allowance is given to a single dealer anywhere in Maryland, the supplier is required to extend "uniformly" the same competitive allowance to every dealer of the supplier in the State. Such a statewide price extension is required even though the particular competitive situation necessitating competitive al-

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[37] As some commentators have stated, "[t]he Supreme Court has adopted an expansive view of the test of competitive injury, which has substantially diminished the burden of providing a *prima facie* case." Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1212 (1976). *See also* Comment, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 Colum. L. Rev. 137, 140 (1968).

lowances is limited to a single dealer or trade area. Since any grant of competitive allowances creates territorial price differences, and since the extension of the competitive allowances statewide cannot be justified under Section 2(b), the territorial price discrimination created by compliance with Paragraph (D) is a *prima facie* primary-line violation of Section 2(a) should the extension threaten to injure competition among suppliers. Compliance with Paragraph (D) thus exposes appellants to potential primary-line liability under Section 2(a).

For example, a supplier in competition with one or more of the appellants may grant a price reduction in one or more trade areas in Baltimore. Competitive necessity may require an appellant to grant allowances to its Baltimore dealers that are in competition with the competing supplier's retail dealers whose lower retail prices reflect the supplier's price cut.[38] Paragraph (D) would then require the appellant to grant the same price reduction to all dealers statewide. Such an extension could cause injury to small local competing suppliers operating solely in localities outside Baltimore where the price war would not have extended but for Paragraph (D). An appellant's dealers in Salisbury, Maryland, for example, would receive a price cut which would enable them to lower their retail prices and undersell the Salisbury dealers supplied by a competitor of appellant. A supplier operating only in Salisbury and supplying a number of retail stations in Salisbury could be driven out of business by such lower retail prices.

Compliance with the requirements of Paragraph D could thus "erode competition" or lead to "a drastically

[38] As the FTC stated in its 1967 Report, "[t]he competitive necessity for the discrimination [under Section 2(b)] . . . can exist, regardless of any disparity in the competitive strength of the discriminator and the supplier whose price it is meeting." (Report at 63 n.15; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18, 246 n.15).

declining price structure" in local markets throughout Maryland. The supplier in Salisbury would have every incentive to bring suit against appellants under Section 2(a) to recover damages suffered because of the statewide extension of the Baltimore price war. *See Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1976); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 956-57 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *H. J. Heinz Co.* v. *Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 464 (S.D.N.Y. 1960). Appellants could not justify competitive injury under Section 2(b) since the extension required by Paragraph (D) was to areas in which appellants were not facing the competing supplier's price cut. Under *Staley* such an extension is not protected by the Section 2(b) defense.[39]

The situation facing appellants is analogous to that presented in *In re Forster Manufacturing Co.*, 62 F.T.C. 852 (1963), *rev'd and remanded*, 335 F.2d 47 (1st Cir. 1964), *upon remand*, 68 F.T.C. 191 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Respondent Forster was charged with "territorial" price discrimination, that is, selling clothespins in Pittsburgh for approximately 10 percent less than in other areas of the country. Its Pittsburgh price was in response to the lower prices offered by a new entrant into the Pittsburgh market, Penley, who had offered a small number of Forster's customers a free case of clothespins

[39] In concluding that Section 2(b) encompassed voluntary competitive allowances, the FTC carefully noted that "[n]othing in this report should be construed as a determination by the Commission that *the burden of establishing the competitive necessity* for a discriminatory price reduction which may be justified under the Section 2(b) proviso is any different in the circumstances referred to above than in a situation in which the seller claiming the defense and the competitor whose price he is meeting are selling to the same customer." (Report at 63 n. 15; 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,246 n.15; emphasis supplied).

for every 10 cases bought. (62 F.T.C. at 911). Forster responded with the same offer to all of its customers in the Pittsburgh area. The Commission held that Forster's area-wide price discrimination had resulted in primary-line injury to competition in violation of Section 2(a). The Commission rejected Forster's meeting competition defense, stating that "the statute 'places emphasis on *individual competitive situations*, rather than upon a general system of competition.'" (*Id.* at 914; emphasis the Commission's). The Commission also noted that "[i]njury at the primary level can be expected to increase in direct proportion to the number of customers receiving the spurious "counteroffer." (*Id.* at 915).

While concurring with the Commission's analysis that Forster's areawide extension of the price reduction was not protected by Section 2(b), the court of appeals reversed, disagreeing with the Commission's additional ruling that Section 2(b) required a seller to have proof positive in advance of lowering its price not only of the amount of the price it is meeting, but also the identity of its competitor. (335 F.2d at 55). Upon remand, the Commission found that Forster had failed to meet properly the equally low price of a competitor, stating: "[*T*]*he Section 2(b) defense does not permit a seller to blanket an entire area with a discriminatory price when he has reason to believe the competitive offer he purports to be meeting is not 'general,' but limited.*" (68 F.T.C. at 198; emphasis supplied).

The teaching of the *Forster* decisions has an unavoidable impact upon appellants and other gasoline suppliers in Maryland. Appellants would be exposed to liability under Section 2(a) for any harm to competition generated by their being forced to grant competitive allowances to dealers that had not been adversely affected by the competing supplier's price reduction. As the Commission found in *Forster*, the extension of the competitive allowances statewide as required by Paragraph (D) would increase injury at the primary-line level "in direct proportion to the number of customers receiving the spurious counteroffer." (62 F.T.C. at 915). *See also Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534-35 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973).

2. *Compliance with Paragraph (D) exposes a seller to potential secondary-line liability under Section 2(a) of the Robinson-Patman Act.*

Compliance with Paragraph (D) also exposes a supplier to secondary-line liability for discrimination between competing dealers. This Court's holding in *Anheuser-Busch* that price discrimination under the Robinson-Patman Act means simply "price differences" applies not only to territorial discrimination affecting primary-line competition, but also to price discrimination affecting secondary-line competition between competing purchasers. Again, the legality of price differences is dependent upon whether there is a likelihood of injury to competition. However, unlike primary-line territorial price discrimination cases where the courts have required plaintiffs to prove actual likelihood of injury to primary-line competition, *see, e.g., Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), this Court has held that the competitive injury requirement in secondary-line cases is satisfied by a simple showing that a seller has discriminated in price between competing customers in a not insignificant amount for a not insignificant time period. *See, e.g., FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948). *See also Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 678-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

Since appellants supply dealers in states adjoining Maryland, some of whom compete with appellants' dealers located within Maryland (A. 676), these principles of secondary-line liability have direct bearing on compliance

with Paragraph (D). Although Paragraph (D) requires that all dealers in Maryland receive the same competitive allowance, this uniform but arbitrary statewide extension of a price reduction creates differences between the prices charged to dealers in Maryland and dealers located near the border of neighboring jurisdictions. Since such nearby dealers are frequently in competition with Maryland dealers (*e.g.*, dealers in Washington, D.C. may compete with dealers in Silver Spring, Maryland), the lower price to Maryland dealers mandated by Paragraph (D) would injure secondary-line competition, thus subjecting appellants to secondary-line liability in a suit by a dealer or dealers located in an adjoining state. As with discrimination affecting primary-line competition, appellants could not employ the Section 2(b) defense to avoid liability since the statewide extension would not have been tailored to an individual competitive situation, as required by *Staley*.

In an attempt to avoid such secondary-line liability, appellants would be required to extend the local Maryland price war to neighboring states. Appellants would be required either to grant decreasing amounts of allowances to dealers further removed from the Maryland border ("feathering")[40] or otherwise to succumb to the ever expanding circle of price reductions ("ripple effect") necessitated by Paragraph (D).[41] The scope of such a "ripple

[40] This use of a feathered price is necessitated by Paragraph (D). Normally, an allowance is feathered from the geographic center of the competing supplier's price reduction. The concept was suggested in *FTC* v. *Sun Oil Co.*, 371 U.S. at 528 n.17, where the Court noted that a properly feathered price reduction might obviate competitive injury among retail dealers. Indeed, Shell's practice of feathering an allowance from the center of the competing supplier's price cut was endorsed before this Court by the FTC in its Reply Brief filed in *Sun*. (Reply Brief at 6).

[41] While a feathered extension of the Maryland allowance to adjoining states might lessen potential secondary-line liability by lessening the chance of secondary-line competitive injury, such an extension could not alleviate potential primary-line liability since the extension would still create territorial price discrimination which could lead to a finding of a likelihood of injury to competition among sellers. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.16.

effect" was recognized by the FTC in *Forster*. Rejecting respondents' contention that an area-wide price cut in response to a narrower specific competitive situation was necessary to avoid secondary-line injury to local purchasers, the Commission stated:

> Respondents' area-wide "meeting" of competition, . . . widened the impact area *and increased the likelihood of competitive injury not only at the primary level, but at the secondary level as well.* . . . To . . . avoid [secondary-line] discrimination and competitive injury, *respondents would have to continue widening the circle of favored customers, perhaps until they encountered some natural physical barrier (such as a mountain range) to protect the nonfavored from the favored buyers.* (62 F.T.C. at 915; emphasis supplied).

See also In re American Oil Co., 60 F.T.C. 1786, 1823 (1962), (Elman, Commissioner, dissenting), *rev'd*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

In sum, by extending competitive allowances to unaffected dealers in compliance with Paragraph (D), a supplier is exposed to potential primary-line and secondary-line liability. Accordingly, Paragraph (D) is void under the Supremacy Clause because compliance with Paragraph (D) inevitably compels a supplier to violate federal law.

E. Paragraph (D) Is Inconsistent With and Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress in Enacting the Robinson-Patman Act.

Paragraph (D) also must be struck down on the independent ground that it nullifies the accomplishment and execution of the full purposes and objectives of Congress

in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act. In enacting Sections 2(a) and 2(b), Congress intended to reconcile the policies of the Sherman Act and the Robinson-Patman Act by permitting price differences which would promote price flexibility and competition while prohibiting price differences which were destructive of competition. By ignoring the competitive injury requirement of Section 2(a) and effectively eliminating the Section 2(b) defense in Maryland, Paragraph (D) denies a seller of the federally bestowed right of self-defense to meet local competition and severely disrupts the delicate balance struck by Congress between the purposes of the Robinson-Patman Act and the Sherman Act. Paragraph (D) thus "clashes with the objectives" of federal antitrust law, and is therefore rendered invalid by the Supremacy Clause. *See Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. at 230-33.[42]

1. ***Paragraph (D) ignores the competitive injury requirement of Section 2(a) and destroys the Section 2(b) right to meet competition, thereby undermining the balance between the Robinson-Patman and Sherman Acts.***

The most fundamental purpose underlying the antitrust laws is the preservation and encouragement of competition. As the Court emphasized in *Standard Oil*, "[t]he heart of our national economic policy long has been faith in the value of competition." (340 U.S. at 248). *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310

[42] In *Sears, Roebuck*, the Court held that the Supremacy Clause precluded the use of a state's unfair competition law to bar a competing manufacturer from copying unpatentable goods, reasoning that such an application of state law would prohibit something permitted by federal patent law thus clashing with the balance implicitly struck by Congress of promoting invention but preserving free competition. (376 U.S. at 230-33). *Cf. Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635-37 (1975).

U.S. 150, 226 n.59 (1940). By limiting Section 2(a) of the Robinson-Patman Act to acts which may substantially lessen competition and by providing in Section 2(b) that suppliers charged with a violation of Section 2(a) could defend themselves by showing that a lower price was offered in good faith to meet the equally low price of a local competitor, Congress intended to promote competition.

By its terms Paragraph (D) forces appellants to make the ruinous choice of (1) not reducing their prices to the particular local dealers adversely affected by a competing supplier's reduction of price to its local dealers and having those dealers lose sales of the supplier's gasoline and switch to other suppliers, or go out of business or (2) meeting the competing supplier's lower price but suffering costly consequences by having to extend the same lower price to all of the supplier's dealers in Maryland.[43] *See Standard Oil Co.* v. *FTC*, 340 U.S. at 250. The end result of such a Hobson's choice is price rigidity and injury to competition both among suppliers and among their dealers.[44] (A. 675-77).

[43] For example, a statewide extension of a three-cent competitive allowance to all 194 Shell dealers in Maryland would cost Shell $12,000 *per day*. (A. 664, 675). Similar losses would be experienced by the other appellants.

[44] Price rigidity would result since a large supplier would prefer to lose sales in a locality rather than suffer thousands of dollars of losses that would result from a statewide extension of a competitive allowance. Eventual injury to competition would also result since a local supplier or a supplier entering the Maryland market could drive out a competing supplier's dealers and eventually the competing supplier itself. Again, a supplier with only a few dealers in a local area may well decide to sacrifice those dealers rather than absorb the losses a statewide extension would entail.

Moreover, the "ripple effect" necessitated by Paragraph (D) means that these effects would not be limited to Maryland. In an attempt to avoid secondary-line liability for price discrimination between competing retail dealers located in neighboring states along the Maryland border, appellants would be required to extend the

The anticompetitive effects that would result from Paragraph (D) are precisely those which Congress sought to avoid by the Robinson-Patman Act. Congress recognized that while the Sherman Act "was intended to preserve the competitive system as our economic order by maintaining the natural flow of trade and freedom of competition in interstate commerce", it alone "was inadequate to accomplish its purpose and that additional legislation was required to reach and prevent unfair methods of competition." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 6 (1936). To obtain these goals, Congress enacted the Robinson-Patman Act "to amend Section 2 of the Clayton Act so as to suppress more effectively discriminations between customers of the same seller *not supported by sound economic differences in their business positions* or in the cost of serving them." (*Id.* at 7; emphasis supplied). These amendments to the Clayton Act were done "with a careful regard to the preservation of full freedom and sound and honest business methods in all its necessary and proper operations." (*Id.* at 6). As the House Judiciary Committee stated, "[i]t is the design and intent of this bill to strengthen existing antitrust laws, prevent unfair price discriminations, and to preserve competition in interstate commerce." (*Id.* at 17).

It is thus clear that a prime Congressional objective in enacting the Robinson-Patman Act was to enhance the purposes of the Sherman Act by amending the Clayton

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Maryland allowances to dealers in neighboring jurisdictions. *See* discussion at 78-79, *supra*. Depending upon the amount of the Maryland allowance, the extension could ripple far beyond the Maryland state line. While the extent of the ripple effect along such a competitive continuum would be alleviated in part by "feathering", where the amount of the uniform Maryland competitive allowance is large, a "feathered" price reduction would encompass very large portions of adjoining states. *See FTC* v. *Sun Oil Co.*, 371 U.S. at 527 n.17. Such a widespread ripple effect exacerbates the ruinous choice faced by suppliers in Maryland.

Act so as to more effectively prohibit price discriminations which could erode competition. As this Court noted in *Standard Oil*, "[i]n the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" (340 U.S. at 248-49). These Congressional objectives, which are nullified by Paragraph (D), are served by Sections 2(a) and 2(b) of the Robinson-Patman Act.

Section 2(a) expressly limits the scope of the Act's prohibition of price discrimination to cases "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . . ." Congress thus realized that it is only price discrimination which is harmful to competition which should be prohibited. As this Court noted in *Anheuser-Busch*, "[w]hat we have said makes it quite evident, we believe, that our decision does not raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2(a) violation." (363 U.S. at 553). Indeed, in *Fairmont Creamery Co.* v. *Minnesota*, 274 U.S. 1, 8-9 (1927), this Court struck down as unconstitutional a state statute which prohibited price discrimination without regard to the effect on competition of such discrimination. *See also New York* v. *Mobil Oil Corp.*, 38 N.Y. 2d 460, 463-64, 381 N.Y.S.2d 426, 428-29, 344 N.E. 2d 357, 359-60 (1976) ("differential prices have long been a familiar characteristic of our free enterprise system, never thought to be either immoral or unlawful").

By conditioning the legality of price discrimination upon a showing of competitive injury, Congress intended to leave untouched price discrimination which enhanced competition or left competition unimpaired. The legislative history of the Act reveals that Congress understood

that a competitive injury clause was necessary.[45] A similar conclusion was reached more recently in the Report of the House Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters (hereinafter Antitrust Subcommittee), where it is stated that the Section 2(a) requirement of competitive injury "reconciles the Act with the Congressional antitrust policy embodied in the Sherman Act and other antitrust statutes."[46] *See Automatic Canteen Co.* v. *FTC*, 346 U.S. at 74.

In addition to Section 2(a), the purposes of the Sherman Act are promoted by the meeting competition defense of Section 2(b). The legislative history of Section 2(b) establishes that Congress recognized that necessities of competition require granting to a seller the right to discriminate in price to the extent necessary to meet competition in different communities.[47] Indeed, the Report of the House Judiciary Committee expressly provides that "[t]here is nothing in [this bill] . . . to limit the freedom of price movements in response to changing market conditions." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936). In essence, "the basic function of the 'good faith' defense of Section 2(b) is to prevent the broad prohibi-

[45] *See* Hearings on H.R. 4994, H.R. 8442 & H.R. 10486, Before a Subcomm. of the House Comm. on the Judiciary, 74th Cong., 2d Sess. 502-03, 507-08 (1936). Eugene W. Burr, a member of the trial staff of the FTC, testified that "if you pass a bill which will make discrimination per se unlawful, so that a man must . . . charge the same price to every customer, wherever he may be located, irrespective of the effect upon competition, then the result would be such that there will remain no price competition, because they will all charge the same price, inevitably. In my judgment, gentlemen, that clause should go into your bill, or you practically nullify the antitrust laws". (*Id.* at 507).

[46] H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 23 (1976). The testimony received by the Subcommittee fully supports its conclusion. *See* Hearings Before the Ad Hoc Subcomm. on Antitrust, The Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 1 at 227 (1975).

[47] *See* discussion at 88-94, *infra*.

tions in Section 2(a) from so rigidifying the market that a seller could not effectively compete with his rivals." *In re Sunshine Biscuits*, 59 F.T.C. 674, 684 (1961) (Elman, Commissioner, dissenting), *rev'd*, 306 F.2d 48 (7th Cir. 1962).

The fundamental purpose of Section 2(b) is thus to permit the price flexibility which is essential to the maintenance of a competitive economy. *See* Adelman, *Price Discrimination As Treated In The Attorney General's Report*, 104 U. Penn. L. Rev. 222, 236 (1955). As former Federal Trade Commissioner Elman has written, "[s]ound antitrust policy would dictate that sellers be free to price their goods flexibly in response to competitive pressures." Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 Wash. L. Rev. 1, 16 (1966). An interpretation of Section 2(b) which permits price flexibility is necessary to further competition and the purposes of Congress. As one commentator has stated:

> A decisional approach which promotes rigidity necessarily discourages price competition as a device for gaining patronage and expanding one's market. Any chipping away at the availability of the "good faith meeting competition" defense simply lends the sanctions of the Patman Act to encourage resistance to price competition. On the other hand, a swing towards liberalization of the defense removes a measure of anticompetitive restraint.

Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U. L. Rev. 173, 178-79 (1962).

This price-flexibility function of Section 2(b) has recently received explicit Congressional recognition in the Report of the Antitrust Subcommittee, where it is stated that the Section 2(b) defense "*expressly recognizes the need for a seller to adjust his pricing practices to particular competitive situations and permits him flexibility to*

compete." [48] (H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 24 (1976); emphasis supplied). As observed by commentators:

> [T]he right to meet a lower competitive price in good faith may be the prime means of placing Robinson-Patman sensibly into the national antitrust policy of competition. To limit that right can quite directly limit price competition, *for a seller told it must cut prices to all or to none might well choose the latter course.*

Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1234-35 (1976); emphasis supplied.[49] This point was also emphasized in the Attorney General's 1955 Report on the Antitrust Laws:

> For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. [Emphasis in original.] As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, *is the essence of competitive economy*." *Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act.* (Report of the Attorney General's National Committee to Study the Antitrust Laws 181 (1955); emphasis supplied).

[48] *See also* Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 2 at 220 (1975-1976); Elman, *supra*, 42 Wash. L. Rev., at 17.

[49] *See also* Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business, 94th Cong., 2d Sess. pt. 3 at 311 (1976) (statement of Dr. Kenneth Elzinga, Professor of Economics at the University of Virginia). Dr. Elzinga states that "[a]ny law which would require management to raise or lower all of its prices to all buyers of its product simultaneously and in equal magnitudes will either be circumvented, or if followed, will cause prices to be more rigid and remain for longer periods of time at non-economic levels. There is much wisdom in the remark of the distinguished Robinson-Patman Act observer F. M. Rowe: 'If a seller by law must lower all his prices or none, he will hesitate to lower any.'" (*Id.* at 319, *quoting* Rowe, *Price Discrimination, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 956 (1951)).

See also ABA, *Antitrust Law Developments* 143 (1975) ("Were it not for this provision, the Robinson-Patman Act would have thwarted the Sherman Act objective of fostering price competition and price flexibility.").

These competitive realities have been repeatedly recognized by this Court and the lower federal courts. As this Court stated in *Standard Oil*:

> We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. *It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.* (340 U.S. at 249; emphasis supplied).

Indeed, in *Standard Oil*, this Court explicitly rejected any interpretation of the Section 2(b) defense which would

> *compel the seller to choose only between ruinously cutting its price to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its price to its remaining customers to cover increased unit costs.* There is, on the other hand, plain language and established practice which permits a seller, through 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its

other customers. (340 U.S. at 250; emphasis supplied).[50]

In *Sun*, this Court also stressed the essential nature of the Section 2(b) defense, stating that as properly limited to instances where the seller is meeting the competition of its own competitors, the defense "comports . . . not only with the objectives of the Robinson-Patman Act *but with the general antitrust policy of preserving the benefits of competition.*" (371 U.S. at 522; emphasis supplied). By effectively precluding a seller from meeting local competition and by prohibiting price differences without regard to competitive impact, Paragraph (D) imposes a Hobson's choice that destroys price flexibility and effectively denies the "benefits of competition." (*Id.*).

2. *In enacting Section 2(b) Congress intended to give a seller the right of self-defense to meet competition on a local basis.*

The progress of the Robinson Bill and the Patman Bill through Congress indicates that both Houses intended to ensure that an interstate seller had the right to meet local

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[50] *See United States* v. *United States Gypsum Co.*, 550 F.2d 115, 124 (3d Cir. 1977), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3182 (U.S. Oct. 3, 1977), where the court flatly rejected the government's contention that Section 2(b) did not force verification of a lower competitive price since defendants had the choice to "(1) refrain from cutting prices to the single buyer; [or] (2) cut prices to all buyers," stating:

> Even the Government concedes that this choice is "difficult." . . . [T]he Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. And it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. The Government's position, then, could induce greater price rigidity. (Citations omitted).

See also Great Atlantic & Pacific Tea Co., Inc. v. *FTC*, 557 F.2d 971, 983 (2d Cir. 1977).

competition. As recognized in *Standard Oil*, the legislative history indicates "that it was the purpose of Congress to limit, but not to abolish, the essence of the defense recognized as absolute in Section 2 of the original Clayton Act." (340 U.S. at 248 n.14).[51] This Congressional recognition of the need to preserve a seller's right to meet local competition is one of the ways Congress reconciled the Robinson-Patman Act with the Sherman Act, thereby promoting the overall purpose of the antitrust laws of protecting and encouraging competition. Paragraph (D) destroys this federally bestowed right to meet a local competitor's lower price.

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[51] Since the *Standard Oil* decision, this Court's construction of Section 2(b) and its legislative history has received repeated Congressional scrutiny. Legislation was introduced in the Eighty-fourth, Eighty-fifth and Eighty-sixth Congresses for the purpose of overruling this Court's interpretation of Section 2(b) as an absolute defense. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 256-64 (1962). In contrast, legislation was introduced in the Eighty-second Congress immediately after the *Standard Oil* decision for the purpose of explicitly affirming this Court's reading of Section 2(b) as providing an absolute defense. *See* S. 719; S. Rep. No. 293, 82d Cong., 1st Sess. (1951). Such legislation was passed in the Senate and approved by the House Judiciary Committee. *See* H.R. Rep. No. 2438, 82d Cong., 2d Sess. (1952).

More recently, the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters of the House Comm. on Small Business held extensive hearings on suggested amendments to the Robinson-Patman Act. In its Report, the Subcommittee stated that "[t]here is no need to alter the meeting competition defenses as it has emerged over the years under the Robinson-Patman Act." H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. 78 (1976). Given the repeated Congressional consideration of this Court's construction of the meeting competition proviso in *Standard Oil* principles of *stare decisis* strongly suggest that Congress has sanctioned the Court's reading of Section 2(b) as furnishing an absolute right to meet the equally low price of a competitor. As this Court very recently stated in *Illinois Brick Co.* v. *Illinois*, —— U.S. ——, 97 S.Ct. 2061, 2070 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

The present Section 2(b) defense was enacted in 1936 as an amendment to a comparable, but broader, provision in Section 2 of the 1914 Clayton Act. *See generally* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 208 (1962). The history of both the original and present defense indicates that Congress has always considered it a competitive necessity for a seller to have the right to meet competition on a local basis.

The omission of a meeting competition defense in an early House version of Section 2 of the original Clayton Act, *see* H.R. 15657, 63d Cong., 2d Sess. § 2 (1914), was strongly criticized by House Judiciary Committee members:

> This section would seem to expose a manufacturer or jobber whose business extended over a wide area to a new and unjust risk. If confronted with competition at one point, and he lowers his price at such point merely and does so to meet the competitor's price in an endeavor (entirely within his legal rights) to keep the customers he has won in a successful business career, it would seem to require him to lower his price all over the vaster area in which he sells his product.
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> * * * *
>
> A competitor who attacks at a single point and is in business only at that point might sell a small quantity of goods at lower prices, and to him this would be a negligible quantity, while the man whose business is assailed must, in order to avoid the appearance of evil and avoid the risk of litigation or prosecution, reduce his prices all over the country and thereby suffer a great loss.
>
> . . . The business of such a manufacturer or jobber would be exposed to attacks savoring of blackmail; and yet, under the requirements of this section, he would have to sit supinely by and see his trade taken away; or, if he attempts to meet the attack—

> which would be his legal right—he must run the risk of appearing to wrongfully injure the business of the competitor or else, by reducing his price everywhere, meet with a great and destructive loss. (H.R. Rep. No. 627, 63d Cong., 2d Sess. pt. 2 at 2-3 (1914)).

As originally drafted, the Senate version of Section 2 of the Clayton Act also did not include a meeting competition proviso. However, a meeting competition exception to the coverage of Section 2 was added by the Senate Judiciary Committee *"upon the ground that the enlargement will tend to foster wholesome competition."* (S. Rep. No. 698, 63d Cong., 2d Sess. 44 (1914); emphasis supplied). As enacted into law in 1914, Section 2 of the Clayton Act included the Senate's meeting competition exception.[52]

In 1936 Congress amended Section 2 of the Clayton Act with the passage of the Robinson-Patman Act, 49 Stat. 1526 (1936). On the Senate side, the Act arose out of the Robinson Bill, S. 3154. While the Senate Judiciary Committee's bill eliminated the meeting competition exception of Section 2 of the Clayton Act,[53] it was subsequently amended on the floor of the Senate to include both a meeting competition *exception* to Section 2(a) and a new meeting competition *defense* in Section 2(b). As passed by the Senate on April 30, 1936, Section 2(a) of S. 3154 provided that "nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition." The meeting the equally low price of a competitor defense in Section 2(b) of S. 3154 was the same as that eventually enacted into law. *See* F. Rowe, *supra*, 569-70.

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[52] The exception proviso stated that "nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." (38 Stat. 730 (1914)).

[53] *See* S. Rep. No. 1502, 74th Cong., 2d Sess. (1936).

The meeting competition exception in S. 3154 was first proposed by Senator McNary. *See* 80 Cong. Rec. 6426 (1936). The day before the McNary amendment was considered, the Senate adopted the amendment offered by Senators Borah and Van Nuys. That amendment outlawed price discrimination only where its purpose was to destroy competition or eliminate a competitor. *Id.* at 6431.

Viewing the McNary amendment in conjunction with the Borah-Van Nuys amendment, Senator Logan praised both as allowing "discrimination in price to meet competition in different communities. . . ." (*Id.*). Likewise, Senator Murphy, noting by example that under the Robinson Bill an interstate milk producer would not "be able to reduce its price in any city to meet local or intrastate competition" (*id.* at 6434), stated that if such producer "should sell at a lower price in one city than in another milk shipped in interstate commerce to meet the competition of interstate commerce, it would fall within its rights in so doing and would not be guilty of a violation of the provisions of this measure." (*Id.*). After Senator Robinson had remarked that he posed no objection to the McNary amendment if taken in conjunction with the Borah-Van Nuys amendment (*id.* at 6435), the McNary amendment was passed. (*Id.* at 6436).

On the same day the Senate adopted the McNary amendment, S.3154 was amended to include the meeting the equally low price of a competitor *defense* contained in Section 2(b). (*Id.* at 6435). Senator Moore explained that "[t]he amendment merely provides that if they [milk producers] charge more to one person than to another, or are accused of discrimination, they shall have the right to prove justification." (*Id.*). Senator Moore further explained that his amendment "goes just a little further than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon [Mr. McNary]." (*Id.*).

On the House side the Robinson-Patman Act arose out of the Patman Bill, H.R. 8442. As introduced, H.R. 8442 did not contain a meeting competition proviso. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 18 (1936). The meeting the equally low price of a competitor defense was added by the House Judiciary Committee. *Id.* at 2. The Committee Report makes clear that the Committee intended to limit the scope of the meeting competition *exception* of Section 2 of the original Clayton Act by eliminating the exception, but granting a seller the right to rebut a violation by showing that its lower price was an individualized response to "local competition" presented by the equally low price of a "local competitor." *Id.* at 16. As passed by the House on May 28, 1936, the Committee's meeting competition proviso had been amended to become identical to the meeting competition *defense* contained in Section 2(b) of S. 3154 as passed by the Senate and which eventually became law. *See* F. Rowe, *supra*, at 573.

The House debates over the meeting an equally low price of a competitor defense show the intent to preserve the seller's right of self-defense to meet local competition. In response to Representative Celler's concern that the Committee's bill did not grant a seller that was faced with competition in a given locality "a right to go into that locality and meet that proposition—lower your price," (80 Cong. Rec. 8228 (1936)), Representative McLaughlin, a member of the House Judiciary Committee, replied: "I have the highest regard for my very good friend, the gentleman from New York . . . *but when he states this [the Committee's bill] will do away with the right to meet competition, that is not so.*" (*Id.* at 8229; emphasis supplied). The meaning of the meeting competition proviso of the Committee's bill was similarly explained by Representative Patman who stated that "[t]he phrase 'equally low price' means *the corporate chain will have*

the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man." (*Id.* at 8235; emphasis supplied).

The House and Senate conferees eliminated Senator McNary's meeting competition exception in Section 2(a), but retained the meeting an equally low price of a competitor defense in Section 2(b). H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6-7 (1936). Upon presenting the Conference Report to the Senate, Senator Van Nuys, one of the conferees, explained that the meeting competition proviso retained by the Committee allowed a respondent to "rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor."[54] (80 Cong. Rec. 9903 (1936)). Both chambers passed the Conference Committee's version without further significant debate.

The foregoing legislative history shows that while Congress intended to narrow the scope of the meeting competition proviso by eliminating the meeting competition *exception* of the original Clayton Act and limiting the scope of the newly added defense to situations where the seller was confronted with the lawful, equally low prices of its own competitors, Congress also recognized that it is a competitive necessity for an interstate seller to have the right to meet "local competition" presented by "local merchants." Paragraph (D) expressly nullifies this federal right thereby frustrating "the full effectiveness of federal law." *Perez* v. *Campbell*, 402 U.S. at 652.

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[54] In light of the fact that Senator Van Nuys was a co-sponsor of the Borah-Van Nuys amendment which was read as affording a seller a right to meet local competition, his concurrence in the Conference Committee's Report suggests that he construed the meeting the equally low price of a competitor defense of Section 2(b) as protecting this right.

III. PARAGRAPH (D) OF THE MARYLAND ACT IS INVALID UNDER THE COMMERCE CLAUSE.

A. Paragraph (D) Burdens Interstate Commerce.

A state has no power to regulate either directly or indirectly commerce beyond its borders. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 521. As this Court recognized in *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 775, it is the "practical effect" of the regulation that is controlling. In this case, the practical effect of Paragraph (D) is to regulate commerce beyond Maryland's borders. Paragraph (D) thereby exceeds the limits of state authority and is invalid under the Commerce Clause.

It is appellants' policy to extend a voluntary allowance to all dealers in the same trade area, since all such dealers are exposed to substantially the same competitive pressures. (A. 158-60, 209-10, 650-51). Further, since trade areas are established on the basis of competitive conditions, not political boundaries, trade areas overlap Maryland's borders. (*Id.*). If Gulf, for example, were to extend a voluntary allowance to a Gulf service station dealer located in the District of Columbia, but near a Gulf dealer located in Silver Spring, Maryland, the same allowance normally would be granted to both the Maryland and District Gulf dealers affected by the competing supplier's price cut. If the voluntary allowance were extended to even one such Maryland dealer, however, Paragraph (D) would require the allowance be extended to every Gulf dealer in the State of Maryland. Moreover, consequences in the nature of "feathering" or the "ripple effect" would exacerbate the extra-territorial effects of the Maryland statewide pricing mandate.[55]

By effectively requiring a supplier such as Gulf to extend a voluntary allowance to all its Maryland dealers

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[55] *See* discussion at note 44, *supra*.

if it should grant an allowance to even one nearby District of Columbia dealer, the likelihood of extending the allowance to the District dealer will be greatly inhibited, if not totally eliminated. Likewise, a supplier would be discouraged from granting a voluntary allowance to any service station dealer in Pennsylvania, Delaware, Virginia or West Virginia located near the Maryland border. By so restricting a supplier's ability to meet competition, the Maryland Act effectively impedes interstate commerce, thereby interfering with the natural functioning of interstate markets. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 806. In conflict with the Commerce Clause, the effect of Paragraph (D) is to license each state and the District of Columbia to regulate "voluntary allowances" in neighboring jurisdictions. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 444; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. at 529-30; *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 770-71.

B. All Proper Local Interests are Promoted Through Alternatives Other than Paragraph (D) With No Adverse Impact Upon Interstate Commerce.

Under the Commerce Clause, the extent to which a burden on interstate commerce will be tolerated "depend[s] upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142. The Maryland Court of Appeals stated that the local interest served by Paragraph (D) is "to prevent the practice of localized price discounts." (J.A. 35a). However, to the extent that localized price discounts are anticompetitive or otherwise improper, they are prohibited by the federal Robinson-Patman Act and Maryland's own version of that Act, Md. Anno. Code (1975), Comm. L. Art. § 11-204. To the extent that localized price discounts are pro-competitive or otherwise proper, as recognized by Congress through Sections 2(a)

and 2(b) of the Robinson-Patman Act, Paragraph (D) would undermine the purposes and objectives of Congress in passing the federal law. Since the federal Robinson-Patman Act and the State's similar Act reflect the legitimate regulation of improper price discounts, the State has failed to justify Paragraph (D) in terms of proper local benefits and unavailability of less restrictive alternatives. Therefore, Paragraph (D) should be invalidated under the Commerce Clause. *Hunt* v. *Washington State Apple Advertising Commission*, 97 S.Ct. at 2446-47; *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142.

CONCLUSION

For the foregoing reasons, Paragraphs (B), (C) and (D) of the Maryland Act should be declared invalid.

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